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WISCONSIN REPORTS

130

CASES DETERMINED

IN THE

SUPREME COURT

OF

WISCONSIN

DECEMBER 4, 1906 — FEBRUARY 19, 1907

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MEMORANDUM.

Mr. Justice TIMLIN took no part in the decision of those cases which were argued or submitted prior to January 8, 1907.

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CASES DETERMINED

AT THE

August Term, 1906.

PETERSEN, Appellant, vs. ELHOLM, Respondent.

September 15—December 4, 1906.

Compromise and settlement: Failure to plead: Failure to object to evidence on that ground: Appeal and error: Evidence: Corporations: Power of stockholders to settle corporate claims.

[1. Whether in a civil action against a corporate officer for fraudulent conversion of corporate funds, seeking an accounting and judgment for the amount found to have been converted, the plaintiff cannot recover if the conversion was not fraudulent, *i. e.* if it did not amount to embezzlement, not determined.]

2. Although where a defense of compromise and settlement is not pleaded, and objection is made on that ground, evidence thereof is not admissible, yet where the evidence on both sides is received without objection as to its admissibility, and that question has been fully tried out, on appeal such question must be considered as having been litigated by consent.

3. In an action against a corporate officer for fraudulent conversion of corporate funds, seeking an accounting and judgment for the amount found to have been converted, the evidence, stated in the opinion, is *held* to sustain a conclusion that enumerated transactions were intended to be a full settlement of defendant's liabilities.

4. A stockholder, in that capacity alone, cannot settle and discharge corporate claims.

5. Although two persons own all the stock of a corporation they do not thereby become the corporation, and their individual action in settling a claim of the corporation against one of them does not bind the corporation.

6. In such case, however, where one was, and continued to be, an officer of the corporation and superintendent of its business, and a settlement arranged between the two was afterwards brought to the notice of the corporation, acquiescence in the transactions and acceptance of the benefits thereby secured bind the corporation.
7. On a motion for rehearing, a statement in the original opinion that, while no defense of settlement was pleaded, the evidence of settlement was received without objection on that ground, and hence the question must be considered as having been litigated by consent, is *held* supported by the record.

APPEAL from a judgment of the circuit court for Racine county: LAWRENCE W. HALSEY, Judge. *Affirmed.*

Action to recover of the defendant moneys of Belle City Sash & Door Company alleged to have been fraudulently diverted by said defendant to his own use. The complaint alleged in substance the following facts: The Belle City Sash & Door Company, a corporation, was organized with plaintiff as president, William Dunphy as vice-president, Alfred Koerner as treasurer, and the defendant as secretary. Prior to such organization plaintiff and Dunphy were copartners operating a mill for the manufacture of sash, doors, and other furnishings for buildings. They had considerable material on hand and had unfinished contracts and other assets, and also had liabilities to the extent of $3,000 besides incumbrances on their plant to the amount of $9,000. Plaintiff, defendant, said Koerner, and Dunphy each took fifty shares of the capital stock of the corporation, each share being for $100. Koerner and defendant paid for their stock by performing, or agreeing to perform, services for the corporation hereafter mentioned, while plaintiff and Dunphy sold their plant and business to the corporation for $20,000, exclusive of unfinished contracts, the corporation assuming $1,200 of liabilities, which it afterwards paid. Defendant, in payment for his stock, agreed to devote one hour's time each day to the business of the corporation, to keep all books

and records, and perform according to modern business methods all duties in that regard. Koerner, in payment for his stock, undertook to build up and establish the business and credit of the corporation. Subsequently the latter sold his stock to defendant and withdrew from the corporation without having performed his agreement, and thereupon the defendant became the treasurer of the corporation and thereafter acted as such while retaining his office of secretary. As such treasurer he was intrusted with the receipt and disbursement of funds of the corporation and other duties incident to his office, and while such treasurer and from the month of August, 1901, to February, 1902, both months inclusive, he diverted the corporate funds and money fraudulently, and wilfully converted the same to his own use to the amount of $5,000, and has since refused to account for the same. The right to recover such diverted funds was duly assigned to the plaintiff before the commencement of this action. Judgment for $5,000 and costs was demanded.

The defendant answered denying all the allegations of fraudulent diversion of funds. The issues raised were sent to a referee to hear, try, and determine. He found the facts substantially as alleged in the complaint as to the organization of the corporation, the subscriptions to the capital stock, the manner in which the same was paid for, or agreed to be paid for, the transfer of the Koerner stock to the defendant, the latter's election as treasurer and his duties, and further found that the defendant had not at any time diverted or fraudulently converted to his own use any money of the corporation, and that by agreement of all stockholders about $2,000 of the corporate funds were used to pay the partnership indebtedness of Dunphy and plaintiff, in consideration whereof it was agreed that defendant might withdraw $1,000 from the corporation, which he did; that many irregularities appeared in the bookkeeping and great neglect in the making of proper entries, but that in general the discrepan-

cies and omissions were satisfactorily explained; further, that in February, 1902, plaintiff and defendant, who then owned all the corporate stock, met, and that plaintiff, representing the corporation, made a settlement with the defendant of all claims of said corporation against the defendant, by which settlement defendant assumed $1,500 of the corporate indebtedness and discharged the same; further, that defendant's stock in the corporation was then sold for $3,750 to third parties, and the money paid into the corporate treasury for the benefit of its creditors. On such findings of fact the referee concluded as matter of law that defendant was entitled to judgment. The finding exonerating defendant from having fraudulently diverted the corporate funds was based on the decision of the referee that the evidence was not sufficient to show that any funds were diverted as alleged under such circumstances as to render the defendant guilty of the offense of embezzlement. Exceptions were filed to the material findings of fact, and a motion was made by plaintiff for a re-reference of the case, which was denied, as was also a motion to correct the findings by striking out several as not properly conclusions of fact. The referee's report was, on motion of the defendant, confirmed, and judgment was rendered accordingly, and the plaintiff appeals.

For the appellant there were briefs by *Eaton & Eaton,* attorneys, and *W. W. Rowlands,* of counsel, and oral argument by *Mr. L. K. Eaton* and *Mr. Rowlands.*

Wallace Ingalls, for the respondent.

The following opinion was filed October 9, 1906:

WINSLOW, J. The complaint charged fraudulent conversion by the defendant of the funds of the corporation in various amounts and ways and at various times during a period of seven months. It was evident to the court that a long account was involved, and a reference was ordered. Upon the hearing before the referee the erroneous character of many

of the entries made by defendant in the corporation books which were attacked by plaintiff was fully admitted, but as to a considerable number the defendant claimed that they were correct. Testimony was introduced *pro* and *con* upon the disputed entries, but the referee made no finding upon them and stated no account, but filed a brief opinion stating that he had considerable doubt as to some of the items of alleged conversion, but that he was "unable to hold that the defendant stole or embezzled the moneys as charged, which is what would have to be found in order to report a decision in favor of the plaintiff." Apparently on this account alone he concluded that the defendant was entitled to judgment, and requested defendant's counsel to prepare the findings which he afterwards signed and which are summarized in the statement of the case. The proposition seems to be that in a civil action against a corporate officer claiming fraudulent conversion of corporate funds and seeking an accounting therefor and judgment for the amount found to have been converted, the plaintiff cannot recover if the conversion was not fraudulent, *i. e.* if it did not amount to embezzlement. We are not referred to any authority in support of this view, and we should hesitate greatly before giving assent to it; however, as we find it unnecessary to decide the question on account of considerations now to be stated, we express no opinion upon it. The referee found as a fact that *Petersen,* acting for the corporation, settled with the defendant for all corporate claims against him, and that the settlement so made was fully carried out. Of course, if this was the fact and the settlement be not impeached for fraud or mistake it closed the controversy. It is true there was no defense of settlement pleaded, and had objection been made to the evidence it would not have been admissible as the pleadings stood, but no such objection was made. The evidence on both sides upon the question was received without objection as to its admissibility on this ground; the question

was apparently fully tried out, and upon very familiar principles it must now be considered as having been litigated by consent.

The finding is challenged as unsupported by the evidence and this contention requires some consideration. It is undisputed that in February, 1902, *Petersen* and *Elholm* between them owned the entire stock of the corporation; that *Elholm* desired to get out of the business; that two persons, Hettrich and Jensen, were considering the advisability of buying two thirds of the business and operating the mill with *Petersen;* that in view of this contemplated purchase *Petersen, Elholm,* and one Owens (who was interested as the owner of a large mortgage on the plant) met at the Commercial Bank in Racine with the books of the company and spent considerable time in examination of the books and negotiation as to the terms upon which *Elholm* was to withdraw; that upon the books it appeared that *Elholm* owed the concern about $1,200, and that as a result of the meeting *Elholm* agreed to assume and pay $1,500 of the debts of the corporation (which he subsequently did pay), and surrendered his half of the stock on the condition insisted on by the defendant that whatever was received from Hettrich and Jensen was to go into the treasury of the corporation. It further appears that at the conclusion of this arrangement *Elholm* stepped out of the business, leaving *Petersen* and Owens in charge, and that a few days later Hettrich and Jensen purchased two thirds of the business, paying $5,000 therefor into the corporate treasury, and that the business was reorganized and the plaintiff *Petersen* became secretary of the corporation and superintendent of the business. As to the purpose of this meeting *Petersen* testified on cross-examination:

"*Elholm* left the corporation in February, 1902. I cannot tell the date exactly, probably around the 7th or the 8th. Had a settlement with him at the Commercial Bank. Car-

penter and Owens and myself were there. I brought him to the bank to settle. I found him at the office of Mitchell & Lewis Co. I think it was the 7th of February, 1902."

Owens testified:

"We met at the bank to get *Elholm,* so as to have the stock transferred, and have some understanding so we could run the concern, and some understanding about his account of $1,200 that appeared on the books. We wanted it settled up. We wanted him to pay what he owed the corporation. There was a great deal of talk there. He agreed to pay $1,500. After that three of us went down to the mill and had the stock transferred. *Petersen* was at the bank."

The defendant, after relating the transaction in detail, testified:

"My assuming these accounts and transferring my stock was to release me from liability, to pay up all irregularities and differences that existed between *Petersen* or the company and myself, and was considered on that day by *Petersen* and myself."

Mr. Carpenter, the cashier of the bank where the conference was held, testified: "They arrived at some settlement whereby *Elholm* was to pay about $1,500."

In view of these facts we find no difficulty in holding that the transaction in question was intended to be a full settlement of the defendant's liabilities to *Petersen* or the corporation, and was, in fact, a settlement of such liabilities so far as *Petersen,* acting individually, could make a settlement. But he could not in his capacity as stockholder alone settle and discharge corporate claims. Although he and *Elholm* owned all the stock they did not thereby become the corporation, and their mere individual action would not bind it. *Button v. Hoffman,* 61 Wis. 20, 20 N. W. 667; 2 Cook, Corp. (5th ed.) § 709. However, *Petersen* was more than a mere stockholder: he was president of the company and superintendent of its business from the start, and it appears that he bought all the merchandise, figured out the contracts,

collected most of the money, and in fact managed the business, leaving the office duties to *Elholm*. It might be forcibly contended that these broad powers carried with them the power to make the settlement in question, but we are not compelled to rest our conclusions on any doubtful proposition. It is well understood that where a corporation, with notice of the facts, acquiesces in an unauthorized contract made on its behalf and accepts the benefits thereof it becomes bound by the contract. 2 Cook, Corp., *supra*. Upon the reorganization of the business of the corporation after Hettrich and Jensen came in, *Petersen* was elected secretary of the corporation and superintendent of its business. He knew all the facts, and his knowledge was notice to the corporation of which he was the executive officer. *Brothers v. Bank of Kaukauna*, 84 Wis. 381, 54 N. W. 786.

But it further appears that Hettrich and Jensen, who became respectively president and treasurer of the corporation after their purchase, also had knowledge of the material facts of the transaction. The books of the corporation were offered in evidence, and upon the daybook which was then in use and continued to be used afterwards, under date of February 11th, appears an entry signed by the defendant, by which it appears that in consideration of a release from liability he assumed and agreed to pay $1,500 of the corporate liabilities. The corporation records also show that Hettrich and Jensen were present at the last meeting of the corporation before reorganization when defendant surrendered all his stock for cancellation, hence they must have known this fact and also the fact that the $5,000 paid by them for their two-thirds interest, of which $3,750 would ordinarily go to defendant for his half of the stock, was all paid into the corporate treasury and actually used to discharge the mortgage indebtedness of the corporation. This would seem to be plenary proof of knowledge on the part of all the officers as well as all the stockholders of the reorganized corporation

of the material facts of the settlement with the defendant. Acquiescence in that settlement and acceptance of the benefits thereby secured is undeniable, and it follows that the corporation is now bound thereby.

No further questions are necessary to be considered in this aspect of the case.

By the Court.—Judgment affirmed.

The appellant moved for a rehearing.

The following opinion was filed December 4, 1906:

WINSLOW, J. It is stated in the opinion that, while no defense of settlement was pleaded, the evidence of settlement was received without objection on that ground, and hence that the question must be considered as having been litigated by consent. This statement is challenged by the appellant in his brief upon the motion for rehearing, and it is confidently claimed that the evidence tending to show the settlement at the bank was duly objected to on the trial, as well as the evidence tending to show a prior settlement made with Dunphy. In view of this challenge we have again carefully examined the record to ascertain whether our statement is erroneous. From this examination it appears that the facts concerning the settlement with Dunphy and the transfer of his stock to *Elholm* were testified to by Mr. Rowlands as a witness for the plaintiff before any testimony for the defense was put in, and the written proposition, acceptance, and release were at the same time offered and received in evidence. The plaintiff, *Petersen,* also testified directly to the fact of the settlement with Dunphy upon his direct examination, but said that the business was conducted with *Elholm.* This certainly opened up the whole subject of the Dunphy settlement to explanation by the defendant.

As to the settlement with the defendant, not only did the plaintiff testify upon cross-examination, without objection,

that he had a settlement with *Elholm* at the bank about February 7th, but, on the case being turned over to the defendant, *Elholm* testified at length to the fact of settlement and all its terms without objection that it was not pleaded, or any other objection going to the merits. It is true that at the close of *Elholm's* direct examination, after the testimony of settlement had all gone in, the following entry appears in the bill:

"Plaintiff's counsel reserving in due time and form all right of objection to any portion of the direct examination of defendant on the ground of competency and materiality."

We cannot regard this general notation, made after the reception of the testimony, as fairly apprising either court or counsel of the objection now claimed. Furthermore, the testimony of Mr. Carpenter, the cashier of the bank, tending to show the settlement, was received without objection on this ground. So far as the record before us is concerned (and we can inquire no further) the statement made in the opinion is fully supported.

By the Court.—Motion for rehearing denied with $10 costs.

WEIDNER, Appellant, vs. STANDARD LIFE AND ACCIDENT INSURANCE COMPANY OF DETROIT, MICHIGAN, Respondent.

October 11—December 4, 1906.

Accord and satisfaction: Part payment of an admitted debt: Consideration: Evidence: Accident insurance: Liability: Questions for jury: Robbery.

1. The part payment of an admitted debt is no consideration for an agreement not to enforce the collection of the balance of the debt.
2. In an action on an insurance policy the answer admitted that a certain sum was due plaintiff under a clause in the policy, de-

nied other liability, and pleaded the payment of the admitted sum as an accord and satisfaction. *Held*, that the payment of what the defendant admitted to be due and payable was not a consideration for the alleged settlement of the claim controverted by the defendant.

3. In an action upon an insurance policy (insuring against loss of time resulting from bodily injury caused by external, violent, or accidental means which disabled the insured, but limiting the loss to one tenth of the amount otherwise payable in event of death due to injuries intentionally inflicted upon the insured by any other person, except assault committed for the sole purpose of burglary or robbery) it appeared, among other things, that the insured received a cruel and intentional blow from a third person, after such third person had taken from the possession and against the will of the insured certain personal property belonging to the insured, and that the insured's death was the result of such blow. *Held*, that the question whether the acts of the third person were for the sole purpose of robbery was one of fact for the jury. SIEBECKER and KERWIN, JJ., dissent.

APPEAL from a judgment of the circuit court for Milwaukee county: ORREN T. WILLIAMS, Circuit Judge. *Reversed.*

This is an action to recover $2,700, the balance alleged to be due upon an accident policy of insurance issued by the defendant upon the life of the plaintiff's husband, Gustav A. Weidner, September 17, 1902,

"against loss of time resulting from bodily injuries caused solely, during the term of this insurance, by external, violent, and accidental means, which shall, independently of all other causes, immediately and continuously disable the insured, as follows: . . . (5) If death results solely from such injuries as the proximate cause thereof within ninety days, the said company will pay the principal sum of three thousand dollars to *Emma Weidner*, his wife, if living. . . . (10) In event of death, loss of limb or sight, or disability due to injuries intentionally inflicted upon the insured by any other person (except assaults committed for the sole purposes of burglary or robbery), whether such other person be sane or insane or under the influence of intoxicants or not; or due to injuries received while fighting or in a riot; or due to injuries intentionally inflicted upon the insured by himself or received by him while insane; or inflicted by the in-

sured on himself while insane; or due to the taking of poison, voluntarily or involuntarily, consciously or unconsciously; or the inhaling of any gas or vapor; or due to injuries received while under the influence of intoxicants or narcotics, or due to an unexpected and accidental result of surgical operation or treatment, then in all such cases referred to in this paragraph, the limit of this company's liability shall be one tenth the amount otherwise payable under this policy, anything in the contrary in this policy notwithstanding."

Such policy was renewed from time to time, the last renewal being made and the last renewal receipt given May 20, 1903.

It is conceded that such policy was in force June 28, 1903. It is alleged in the complaint, in effect, that June 28, 1903, the said Gustav A. Weidner received bodily injuries caused solely by external, violent, and accidental means, which were the proximate cause of his death July 10, 1903; that on the afternoon of June 28, 1903, the said Gustav A. Weidner was riding in a wagon, in company with the plaintiff and several other persons, quietly and peaceably, upon the highway, returning from the village of Hales Corners toward the city of Milwaukee, and that two men, then unknown to the said Gustav A. Weidner or to the plaintiff, approached the said wagon, and that one of them suddenly and violently, and against the will of the said Gustav A. Weidner, seized a pair of rubber boots belonging to him, and then and there in his possession, for the purpose of robbery, as the plaintiff verily believes; that the said Gustav A. Weidner thereupon immediately sprang from the wagon and demanded the return of said boots, and that the man having the boots in his hand thereupon struck the said Gustav A. Weidner, and knocked him down, and beat him upon the head and face with one of the said boots, inflicting injuries upon the face and head of the said Gustav A. Weidner from which he died July 10, 1903; that said injuries left visible marks upon the head and face and body of the said Gustav A. Weidner, and were the sole

and proximate cause of his death; that the plaintiff demanded of the defendant, at the time of the proofs of death as aforesaid, payment of said sum of $3,000 under the policy, but that the defendant refused to pay said sum, or any sum except $300 paid July 30, 1903; and that there is now due and payable to the plaintiff by the defendant upon said policy the sum of $2,700, with interest thereon from July 10, 1903.

The defendant answered, by way of admissions, denials, and counter allegations, to the effect that such injuries were not the result of any assault committed for the sole purpose of burglary or robbery, and that under the tenth clause of the policy above set forth the plaintiff was only entitled to one tenth of the amount otherwise payable under the policy, and that the defendant had accordingly paid to the plaintiff on said claim $300 on July 30, 1903. As a second and separate defense the answer alleges that, in pursuance of an agreement between the plaintiff and the defendant, the plaintiff accepted and received said $300 in consideration and discharge of the plaintiff's claim and the surrender of said policy of insurance for cancellation.

At the close of the testimony on the part of the plaintiff the defendant moved for a nonsuit, which the court denied, and reserved its final decision until all the evidence was in. After the evidence on the part of the defendant was closed, and rebutting evidence on the part of the plaintiff, the court granted the defendant's motion for a nonsuit. From the judgment entered thereon the plaintiff appeals.

The evidence on the part of the plaintiff tended to prove: That the plaintiff and her husband and the plaintiff's parents and three friends, Mr. and Mrs. Wottashek and Mrs. Denzin, had spent the morning of June 28, 1903 (being Sunday), at Hales Corners. Mr. Wottashek had a piece of swamp land and wanted to cut the grass. The plaintiff's husband had accordingly taken his rubber boots along. In the afternoon they started to drive home to Milwaukee in an

express wagon belonging to Wottashek, who drove the team, and with him on the front seat sat the plaintiff's father and her husband, the latter sitting on the left. In the next seat sat the plaintiff, her mother, and Mrs. Wottashek, and in the box of the wagon sat Mrs. Denzin. On the floor of the wagon box lay the rubber boots belonging to the plaintiff's husband. As they approached the tollgate they passed two men, one of whom asked for a ride and showed a blue ticket. Wottashek drove on, as there were seven then riding in the wagon. Then one of the men, whose name was afterwards found to be Tinger, demanded his ticket back. The ticket had then been returned by Mrs. Denzin to the other man, who said to Tinger: "Come on! come on! I got the ticket." Tinger then took the rubber boots belonging to the plaintiff's husband out of the wagon and started off. Mr. Wottashek then stopped the horse, and the plaintiff's husband got off on the left side and walked around the wagon toward Tinger, and said to him: "See here! those are my boots, and I want them back;" and he had hardly said so when Tinger struck the plaintiff's husband on the chest with his fist. The plaintiff's husband fell down from that blow, and while he was lying on the ground Tinger hit him in the face with the heel of the rubber boot, breaking his glasses and his nose, and thereupon Mr. Wottashek had a tussle with Tinger. The plaintiff's husband did not strike Tinger at all. Infection set in, and the plaintiff's husband died twelve days later from septic poisoning following the injury and originating at the wound. Immediately after taking Weidner's boots and upon his request to give them back, Tinger, while retaining possession of the boots, committed the fatal assault, for which he was subsequently convicted of manslaughter. Tinger's purpose in committing the assault can be judged only from his actions.

H. L. Kellogg, attorney, and *Joseph B. Doe,* of counsel, for the appellant.

For the respondent there was a brief by *Roemer & Aarons,* and oral argument by *J. H. Roemer.*

CASSODAY, C. J. 1. The trial court granted the nonsuit, in part upon the ground that the plaintiff received the $300 mentioned in the complaint with the advice and consent of her friend and agent and with knowledge of what was being settled and the effect of the settlement, so that, if the defendant was liable for more than the $300, yet that settlement was based upon a sufficient consideration and disposed of any further liability under the policy. In other words, the court held and counsel contend that the payment to the plaintiff of $300, for which she gave to the defendant a receipt "in full settlement of claim under policy," was a complete accord and satisfaction. The answer admits that the $300 was due to the plaintiff under the tenth clause of the policy, and pleads the same as an accord and satisfaction. The difficulty with such contention is that it seeks to make the payment of what the defendant thus admitted to be due and payable a consideration for the alleged settlement of the claim controverted by the defendant. It is well settled in this and other states that part payment of an admitted debt is no consideration for an agreement not to enforce the collection of the balance of such debt. *Otto v. Klauber,* 23 Wis. 471; *Lathrop v. Knapp,* 27 Wis. 214, 225; *Lerdall v. Charter Oak L. Ins. Co.* 51 Wis. 426, 429, 8 N. W. 280, and cases there cited; *Continental Nat. Bank v. McGeoch,* 92 Wis. 286, 310, 66 N. W. 606; *Herman v. Schlesinger,* 114 Wis. 382, 400, 90 N. W. 460; *Prairie Grove C. Mfg. Co. v. Luder,* 115 Wis. 20, 89 N. W. 138, 90 N. W. 1085. We must hold that the defense alleged of an accord and satisfaction has not been established; certainly not by the uncontradicted evidence, as held by the trial court.

2. But the trial court also reached the conclusion that under the evidence it was clear that "a dispute and a contro-

versy had arisen between these parties upon the road, and that the *sole purpose* of that assault was not robbery." In reaching such conclusion the trial judge made this statement:

"In my opinion this raises a *pretty close question.* I think I must grant this motion. The evidence conclusively shows, I think, that the assault upon the insured was not for the *sole purpose* of robbery."

The circumstances under which the boots were taken by Tinger, and the blows he inflicted upon the insured when he demanded the boots, sufficiently appear in the summary of evidence contained in the foregoing statement. It is undisputed that the boots belonged to the insured and were at the time lying on the floor of the wagon occupied by him and others. There is no pretense that Tinger had any right to or interest in the boots, and no excuse is suggested for his taking them from the wagon. The taking of the boots from the possession of the insured was without consent and obviously wrongful. They were so taken in the presence of the insured, and Tinger remained with the boots in the presence of the insured up to the time of striking the fatal blow. The provisions of the policy here applicable are set forth in the foregoing statement. The question recurs whether the assault so committed by Tinger was "for the sole purpose of . . . robbery," within the meaning of the policy. As claimed by counsel for the defendant, robbery is usually defined as the felonious taking and carrying away of the personal property of another, from his person *or in his presence,* by violence or by putting him in fear; citing numerous text-writers, including 24 Am. & Eng. Ency. of Law (2d ed.) 991. The same counsel cites Bishop, where it is said:

"Robbery is a violent larceny from the person (or from the immediate presence, which is termed in law the person) of one usually, not always, assaulted; or, in more apt legal phrase, it is larceny committed by violence from the person of one put in fear." 1 Bishop, New Crim. Law, § 553.

In other words, it is a species of larceny which is aggravated by violence inflicted on the person of the one rightfully in possession of the property, or the putting him in fear of injury. 24 Am. & Eng. Ency. of Law (2d ed.) 994; *Crews v. State,* 3 Cold. 350. Robbery being a higher crime than larceny, it is necessary in the administration of criminal law to differentiate the one from the other. And so it is claimed that the violence or putting in fear must precede or accompany the taking, and not be employed merely as a means of escape or to prevent a recaption of the property. Certainly there are adjudications to that effect.

But what is meant by such taking through violence or fear? The adjudications on the subject are not in harmony, even in criminal cases. It is said by a recent text-writer of ability that "the force necessary" to constitute robbery may "be either actual or, in a sense, constructive. Thus, robbery may be accomplished, in most jurisdictions, by threats or putting the person robbed in fear and overcoming his will." It is "the felonious taking of personal property from the person *or in the presence* of another, against his will, by means of force or fear." 4 Elliott, Ev. § 3129. See *Shinn v. State,* 64 Ind. 13, 17. In Ohio it has been held:

"Where one, without threats or putting in fear, wrests from the possession of another anything of value, and immediately thereafter, for the purpose of retaining the possession of the property on making his escape, violently strikes the other, such violence is concomitant with the taking, and constitutes robbery." *Sherman v. State,* 4 Ohio Cir. Ct. 531.

In the supreme court of that state it has been held that "it is not necessary to show that the property taken was actually severed from" the person of the prosecuting witness, but that "it is enough if the property was in his presence and under his immediate control, and, he laboring under such fear, the property was taken by the accused with intent to steal or rob." *Turner v. State,* 1 Ohio St. 422. To the same effect,

Hill v. State, 42 Neb. 503, 60 N. W. 916. In New York the captain of a schooner at anchor heard a noise on deck at midnight, and thereupon went above through the cabin, and found the accused, who pointed a pistol at him and ordered him to go below or he would blow his brains out. The captain then struck him and knocked him overboard, and, after stoning the captain, two other men, who were with the accused, jumped into a boat and rowed away. After they had departed the captain found that certain articles had been taken from the boat; and it was held that the evidence was sufficient to sustain a conviction for robbery. *People v. Glynn,* 54 Hun, 332, 7 N. Y. Supp. 555, affirmed 123 N. Y. 631, 25 N. E. 953. In Mississippi it has been held:

"To constitute robbery it is not necessary that the person robbed must have been first in fear of his person or property. If the goods be taken either by violence or by putting the owner in fear, it is sufficient to render the felonious taking a robbery." *McDaniel v. State,* 8 Sm. & M. 401, 402.

Thus it appears that the question whether there has been a felonious taking of property from the person or in the presence of the owner by violence or putting him in fear, actual or constructive, has not always been regarded by courts as free from ambiguity, even in criminal cases. This is a civil action based upon an express contract; and the question presented is whether the trial court properly held, as a matter of law, that Tinger did not strike the insured for the sole purpose of robbery. Of course, in construing such contracts, the ordinary meaning of the words employed must be enforced. *De Rothschild v. Royal Mail S. P. Co.* 7 Exch. 734, 742; *Behling v. N. W. Nat. L. Ins. Co.* 117 Wis. 24, 93 N. W. 800. When the intent of an insurance contract is doubtful, this court has held that the "conditions providing for forfeitures are to be construed strictly against those for whose benefit they were inserted." *Morse v. Buffalo F. &*

M. Ins. Co. 30 Wis. 534. In a later case it was said by RYAN, C. J.:

"Forfeitures are not encouraged in the law. When forfeitures of insurance policies rest on substantial grounds, going to the risk, this court will uphold them. But when forfeitures are alleged on purely technical grounds, not going to the risk, the rule is universal that the contract of insurance is to be upheld, if it can be without violation of any principle of law." *Appleton I. Co. v. British Am. A. Co.* 46 Wis. 23, 32, 1 N. W. 9, 50 N. W. 1100.

In *Shafer v. Phœnix Ins. Co.* 53 Wis. 361, 10 N. W. 381, it was held that "conditions inserted in a policy by the insurer, to work a forfeiture, should be plain, easily understood, and free from ambiguity." So it has been held that the question whether the stipulation in the policy as to the use of the property "materially increased the risk was one of fact for the jury." *Kircher v. Milwaukee Mech. Mut. Ins. Co.* 74 Wis. 470, 43 N. W. 487. Such liberal rules of construing an insurance policy were applied in a case where the insured was accidentally shot in the back, producing immediate and total paralysis of the lower part of the body and entirely destroying the use of both feet. *Sheanon v. Pac. Mut. L. Ins. Co.* 77 Wis. 618, 46 N. W. 799; *S. C.* 83 Wis. 507, 53 N. W. 878. To the same effect, *Lord v. Am. Mut. Acc. Asso.* 89 Wis. 19, 61 N. W. 293. So it has been held by this court in relation to contracts generally:

"When the terms of a contract are indefinite, uncertain, and susceptible of two constructions, and by giving them one construction one of the parties would be subjected to a forfeiture, and by giving them the other no such forfeiture would be incurred and no injustice would be done to the other party, the contract should be so construed as not to create the forfeiture." *Jacobs v. Spalding,* 71 Wis. 177, 190, 36 N. W. 608.

In the case at bar it is quite obvious that Tinger intended to take the boots by force from the possession and against the

will of the insured. The blow inflicted upon the insured was cruel and intentional. The purpose of Tinger was the question for determination. After careful consideration we are constrained to hold that the question whether it was committed for the sole purpose of robbery was one of fact for the jury.

By the Court.—The judgment of the circuit court is reversed, and the cause is remanded for a new trial.

The following opinion was filed December 18, 1906:

SIEBECKER, J. (*dissenting*). The contract insures against loss of time resulting from bodily injury caused by external, violent, or accidental means which shall disable the insured, but limits the loss to one tenth of the amount otherwise payable "in event of death . . . due to injuries intentionally inflicted upon the insured by any other person (except assaults committed for the sole purpose of burglary or robbery)." The court holds that the word "robbery" was used in the contract, not in its strictly legal sense, but in a different and popular sense, and as being a felonious taking from the presence of the owner against his will.

In arriving at the intention of the parties, insurance contracts are to be construed as are contracts pertaining to other subjects. When words employed in such contracts have a definite meaning and it is obvious that they were so used by the parties, then there is no room for interpretation, and the terms of such contracts are to be applied in the policies in the sense intended by the parties. It is only in cases of doubtful meaning of terms that courts have construed them against the insurer. As stated in *Travellers' Ins. Co. v. McConkey,* 127 U. S. 661, 8 Sup. Ct. 1360:

"Such being the contract, the court must give effect to the provisions according to the fair meaning of the words used, leaning, however, where the words do not clearly indicate the

intention of the parties, to that interpretation which is most favorable to the insured"—citing cases. See, also, 1 Cooley, Briefs Ins. Law, 627 *et seq.*

The language limiting loss to one tenth of the amount otherwise payable, when the injuries were inflicted intentionally by another person, is certainly clear and definite and free from doubt, and includes every injury intentionally inflicted. From this limitation the parties except injuries inflicted by another committing an assault upon the insured *"for the sole purpose of burglary or robbery."* Obviously, this language can mean but one thing, namely, the infliction of injury by another in the commission of the crimes of burglary or robbery. This is the natural import of the terms and language of the contract, and they suggest no doubt or ambiguity as to the intention of the parties. If the parties had intended to include in this exception an injury which was intentionally inflicted by another engaged in thievery, they would naturally have expressly so stated it in the exception. I am of opinion that there is no ambiguity in the use of the terms "burglary" and "robbery" employed to express the exception, and the context clearly indicates that the parties used them in their definite legal sense. *Germania F. Ins. Co. v. Deckard,* 3 Ind. App. 361, 28 N. E. 868; *Lycoming F. Ins. Co. v. Schwenk,* 95 Pa. St. 89; *Gauch v. St. Louis Mut. L. Ins. Co.* 88 Ill. 251; *Dupin v. Mut. Ins. Co.* 5 La. Ann. 482; *Travellers' Ins. Co. v. McConkey, supra.*

From an examination of the evidence it appears that the injuries which resulted in the assured's death were not inflicted in an assault by another committed for the sole purpose of committing a robbery. To constitute such an offense, the taking and obtaining possession of the property must be accomplished through violence or fear, which must precede or be concomitant with the act of taking. If the violence follows the taking, either because the owner attempts to regain possession of the property taken or for any other reason, then

it is not robbery. It seems to me there is no confusion or uncertainty in the decisions on this point. 2 East, Pl. Cr. 707 *et seq.;* 2 Archbold, Crim. Pr. & Pl. 1289; 2 Chitty, Crim. Law, 801, 804; 1 Hale, Pl. Cr. 531 *et seq.; Thomas v. State,* 91 Ala. 34, 9 South. 81; 1 Whart. Crim. Law (10th ed.) § 850; 24 Am. & Eng. Ency. of Law (2d ed.) 996.

In my opinion the trial court held correctly in dismissing the complaint.

KERWIN, J. I concur in the foregoing opinion of Mr. Justice SIEBECKER.

DAVIDOR, Respondent, vs. ROSENBERG, Appellant.

November 7—December 4, 1906.

Ne exeat: *Functions at common law: Statutory provisions: "Any person:" "Sufficient grounds."*

1. The writ of *ne exeat* is not created, nor are its functions defined, by statute.
2. Secs. 2784–2786, Stats. 1898, recognize the common-law writ of *ne exeat* and make certain provisions regulating practice, but do not pretend to enlarge its scope.
3. At common law the writ of *ne exeat* was simply a writ to obtain equitable bail. It was issued by a court of equity on application of the complainant against the defendant when it appeared that there was a debt positively due, certain in amount or capable of being made certain, on an equitable demand not suable at law (except in cases of account and possibly some other cases of concurrent jurisdiction), and that the defendant was about to leave the jurisdiction, having conveyed away his property, or under other circumstances which would render any decree ineffectual. It was issued only against a debtor who was a party to the suit, not against a third person not a debtor whether he was a party to the suit or not.
4. Under sec. 2784, Stats. 1898 (providing that the writ of *ne exeat* may be granted to prevent "any person" from leaving the state), and sec. 2785 (providing that no writ shall be granted unless it appears that "sufficient grounds" exist therefor), "sufficient

grounds" mean grounds sufficient under the principles of the common law, and "any person" does not cover any one unless it appears that the party to whom the writ is directed is a debtor.

5. Before answering, upon an affidavit alleging that plaintiff was indebted to him for money loaned; that the plaintiff had transferred all his property to one D. without consideration and in fraud of creditors, and that both plaintiff and D. intended to leave the state with such property and leave the defendant remediless, defendant procured a writ of *ne exeat* to be issued against plaintiff and D., who were arrested and gave bail. Thereafter the writ was vacated. *Held*, that the writ was rightly vacated (1) as to D., who was neither a debtor nor a party to the action; (2) as to plaintiff, since the writ was not granted at common law on the application of the defendant against the plaintiff.

6. Sec. 2785, Stats. 1898, plainly recognizes and emphasizes the common-law principle that a writ of *ne exeat* is not granted on the application of a defendant, by providing that it shall only be granted on the affidavit of the *plaintiff* or some indifferent witness, and that the penalty of the bond or security to be given by the *defendant* shall be indorsed on the writ.

[7. Whether a defendant, who has already interposed a counterclaim showing a certain debt due him from the plaintiff on an equitable demand, may be regarded as a plaintiff so as to be entitled to the writ of *ne exeat* upon a proper showing, not determined.]

APPEAL from an order of the circuit court for Milwaukee county: J. C. LUDWIG, Circuit Judge. *Affirmed.*

Harry M. Silber, for the appellant.

C. H. Hamilton and *William Kaumheimer*, for the respondent.

WINSLOW, J. The plaintiff sued the defendant in equity alleging numerous money transactions between himself and the defendant and praying an accounting and judgment for the balance due. The defendant before answering made affidavit alleging that plaintiff was indebted to him for money loaned; that plaintiff had recently transferred all his real and personal property to one Alice M. Dawson without consideration and in fraud of his creditors; and that he had good reason to believe that both said Dawson and the plaintiff in-

tended to leave the state with such personal property and leave the defendant remediless. Upon this affidavit a writ of *ne exeat* was issued against the plaintiff and said Dawson and they were arrested and gave bail. Upon motion the writ of *ne exeat* was vacated, and the defendant appeals from the order of vacation.

The writ of *ne exeat* is not created, nor are its functions defined, by statute. Secs. 2784, 2785, 2786, Stats. 1898, recognize the common-law writ and make certain provisions regulating the practice, but do not pretend to enlarge its scope. As to the general functions of the writ and the grounds upon which it may issue we must turn to the principles of the common law. *Bonesteel v. Bonesteel,* 28 Wis. 245. At common law it was simply a writ to obtain equitable bail. It was issued by a court of equity on application of the complainant against the defendant when it appeared that there was a debt positively due, certain in amount or capable of being made certain, on an equitable demand not suable at law (except in cases of account and possibly some other cases of concurrent jurisdiction), and that the defendant was about to leave the jurisdiction, having conveyed away his property, or under other circumstances which would render any decree ineffectual. *Dean v. Smith,* 23 Wis. 483; *Rhodes v. Cousins,* 6 Rand. 188, 191, 18 Am. Dec. 715; *Gilbert v. Colt,* 1 Hopk. Ch. 496, 14 Am. Dec. 557, and note.

It is issued only against a debtor who was a party to the suit, not against a third person not a debtor whether he be a party to the suit or not. The ancient writ always recited that it appears that the defendant is indebted to the complainant and designs quickly to go to parts beyond the seas. Beames, Ne Exeat, 18. Nor is this latter rule in any wise changed by the terms of sec. 2784, *supra,* which provides that the writ may be granted to prevent *"any person"* from leaving the state, for the obvious reason that the following section provides that no writ shall be granted unless it appears that "suf-

ficient grounds" exist therefor. Sufficient grounds means, as we have seen, grounds sufficient under the principles of the common law, and no grounds are sufficient under those principles unless it appears that the party is a debtor. So it is very certain that the writ was rightly vacated as to Alice M. Dawson, who was neither a debtor nor a party to the action.

It seems equally certain that the writ was not granted at common law on the application of the defendant against the plaintiff. We have been referred to no case where the defendant was awarded the writ against the plaintiff, nor have we found any. On the contrary, both the decisions and the text-books describe the writ as one issued on application of the complainant and against the defendant, and our statutes plainly recognize and emphasize this principle by providing that it shall only be granted on the affidavit of the *plaintiff* or some indifferent witness, and that the penalty of the bond or security to be given by the *defendant* shall be indorsed on the writ. Sec. 2785, *supra.*

Whether a defendant who has already interposed a counterclaim, showing a certain debt due him from the plaintiff on an equitable demand, may be regarded as a plaintiff so as to be entitled to the writ upon a proper showing, is a question not before us and one on which we intimate no opinion. When this writ was granted no such counterclaim had been interposed, and the writ was therefore granted without jurisdiction in any view of the case.

By the Court.—Order affirmed.

BASSLER and others, Appellants, vs. REWODLINSKI and another, Respondents.

November 7—December 4, 1906.

Joint tenancy: Common-law rights on death of joint tenant: Survivorship: Tenancy in common: Devise by one joint tenant: Effect on right of survivorship: Abolition of joint tenancy by statute: Husband and wife: Tenancy by entireties: Abolition by statute: Rights of wife in realty conveyed jointly to husband and wife.

1. A joint tenancy by the common law is one where the interests are created by one and the same person and by one and the same conveyance and commence at one and the same time and are held by one and the same possession, and so have the four unities of interest, title, time, and possession.
2. A joint tenancy by the common law differs from others in that if the four unities continue till the death of one of the parties, the other or others immediately become the owners of such interest as joint tenants by right of survivorship.
3. Anything which destroys the unity of title or interest, as by alienation of one joint tenant, makes the owners of the several interests a tenant in common with the remaining joint tenant.
4. There can be no destruction of a joint tenancy by devise, since the right of survivorship takes precedence thereof.
5. Joint tenancies, according to the common law, except as expressly declared, were abolished generally by sec. 2068, Stats. 1898, but an exception was made by sec. 2069 as to husband and wife.
6. At the common law, circumstances making a joint tenancy generally, as to husband and wife, make them tenants by the entireties, differing from joint tenancies, in that there is no right of severance, terminating the right of survivorship.
7. The added element mentioned, creating tenancies by the entirety, has not existed in this state since the revision of the statutes of 1878. Since that time such circumstances as by the common law would make husband and wife tenants by entireties, make them joint tenants.
8. A married woman joint tenant is under all the disabilities of a joint tenant by the common law. She cannot under the statute, as regards her capacity to take, hold, enjoy, and convey property, devise her interest held as joint tenant. She has the same right as if she were unmarried, which would not include that of devising property held in joint tenancy.

[Syllabus by MARSHALL, J.]

APPEAL from a judgment of the circuit court for Milwaukee county: WARREN D. TARRANT, Circuit Judge. *Affirmed.*

Action to enforce alleged liens on real estate claimed to have been created as indicated by the facts found by the trial court, which may be stated briefly thus: (1) Johanna Ertman died in 1899 leaving her surviving Paul Ertman, her husband, and the plaintiffs, sons by a former husband. (2) January 22, 1892, said Paul Ertman, who was the owner of the real estate in question, and the said Johanna, his wife, conveyed such property to Valentine Lukaszewski, who reconveyed the same to them as husband and wife, and they owned and occupied it thereafter until the death of Johanna. (3) April 10, 1895, they duly mortgaged the property to Henry Herman to secure indebtedness to him of $800, and on May 10, 1897, they mortgaged the same to him to secure a like indebtedness of $100. After the death of Johanna her husband mortgaged the property to said Herman for $900, to take up the two prior mortgages. (4) Thereafter said Paul Ertman sold the said real estate and conveyed the same to the defendants, who have since occupied it. (5) Johanna Ertman left a last will and testament, which was in due time duly admitted to probate, whereby she willed $200 to each of the plaintiffs to be paid out of her interest in said real estate, and she willed the residue of such realty to her husband. (6) The will was admitted to probate November 8, 1899, by the county court of Milwaukee county, Robert E. Bailey being appointed executor. (7) Said Johanna left no personal property and no real estate, except that in question. (8) July 7, 1903, the said county court, in due form, assigned said realty to Paul Ertman without prejudice to any conveyance made by him, subject to the payment of $200 to each of the plaintiffs, and $45.15 to the executor, which were declared to be liens upon the property. On these findings the court concluded as matter of law that at the time of the death of Johanna Ertman she and her husband were joint tenants of the

realty and thereupon that the latter took the whole by right of survivorship free from anything contained in the former's will, and that the defendants, as owners under Paul Ertman, were entitled to judgment dismissing the complaint with costs. Judgment was rendered accordingly, from which this appeal was taken.

For the appellants the cause was submitted on the brief of *J. E. Wildish,* and for the respondents on that of *Roemer & Aarons.*

MARSHALL, J. This case turns upon whether a joint tenancy in lands of husband and wife has the same characteristics as to survivorship under our statutes as between others at common law. It is conceded that the circumstances detailed in the findings satisfy all the essentials of a joint tenancy at common law in cases other than those of husband and wife. The interests were created by one and the same purchase and by one and the same conveyance; they commenced at one and the same time and were held by one and the same possession. Thus we have the four unities: unity of interest, unity of title, unity of time, and unity of possession.

The special significant incident of joint tenancy is the right of survivorship, by which on the death of any tenant his interest goes to his survivors. Anything which destroys the unity of title or interest without affecting the unity of possession will turn the interest severed from the others into a tenancy in common as regards the remaining joint tenants. 2 Bl. Comm. 192; 1 Washb. Real Prop. (6th ed.) § 864. The most familiar method of so severing the interest of one joint tenant from the interests of others is by alienation. As such severance to be effective is required to occur during the lifetime of the joint tenant, a devise by such a tenant is inoperative. The rule on that subject is thus stated at sec. 865 in Washburn on Real Property:

"A devise by one joint tenant of his share will be inoperative, inasmuch as the right of survivorship takes precedence

of such devise. And so far does this principle prevail, that if such devisor be himself the survivor, he must republish his will after the survivorship has accrued, in order to give it effect."

Sec. 2068, Stats. 1898, which originated before the conveyance in question, abolishes joint tenancies, except where the tenancy is expressly declared to be in joint tenancy, but by sec. 2069 grants to husband and wife are excepted. So circumstances that would create a joint tenancy generally at common law will create one between husband and wife under the Statutes, unless there be some other statute than those referred to to the contrary. In case of husband and wife circumstances that would as between other parties create a joint tenancy only, would as to them add another element in the absence of any statutory regulation making them tenants by the entireties, as to which there could be no severance by partition or alienation. 17 Am. & Eng. Ency. of Law (2d ed.) 652. That feature has not existed here since the Revision of 1878. Circumstances which prior thereto made the husband and wife tenants by entireties subsequently have made them joint tenants with the common-law characteristics thereof. That is clearly the effect of *Citizens' L. & T. Co. v. Witte,* 116 Wis. 60, 92 N. W. 443, and *Wallace v. St. John,* 119 Wis. 585, 97 N. W. 197. The subject was in the latter case treated at length by the present chief justice. Nothing can be gained by going over the same anew. Citing from the earlier case with approval, the court said:

"Both sections as so amended [referring to sec. 2340 and sec. 2342], as well as the revisers in their notes, treat the estate created by deed running to husband and wife, as in the case at bar, as an estate 'held in joint tenancy,' instead of being held as tenants of the entirety, as at common law. . . . Manifestly, the revisers intended by the amendments to cover cases of tenants of the entirety held by husband and wife, especially as in one section the words 'held in joint tenancy' follow the words 'the real estate of every description,' and in the other section follow the words 'any interest or estate therein

of any description,' and in both sections they are followed by the words 'and the rents, issues, and profits thereof,' or their equivalent. Unless that is so, the new provisions inserted in the sections are without significance."

Counsel for appellants earnestly contend that sec. 2342, aforesaid abolishing the disabilities of married women as to the acquirement and enjoyment of property, inferentially at least, clothes such a woman, who is a joint tenant of property with her husband, with the capacity to pass her interest in such property by devise. These words are referred to:

"Any married female may . . . convey and devise real and personal property and any interest or estate therein of any description, including all held in joint tenancy with her husband, . . . with like effect as if she were unmarried."

It is urged that nothing contained in *Wallace v. St. John, supra,* is inconsistent with the claim that such statute permits a joint tenancy between husband and wife to be severed by a devise by the wife, since the case only dealt with severance by alienation. The conclusive answer to that seems to be that in both of the cases cited the court held that since the Revision of 1878 a conveyance of land to husband and wife, instead of creating estates by the entireties, creates a joint tenancy with all the common-law characteristics thereof. The language of sec. 2342, as suggested by counsel for respondents, gives to a married woman joint tenant the same rights in the property as she would possess if she were unmarried, but as in the latter case she cannot defeat the right of survivorship by devising the property, she cannot in the former.

So the learned trial court reached the right conclusion. Johanna Ertman being a joint tenant of the property with her husband, she was under a disability, the same as he was, to pass her interest or to in any way incumber it by will. Her attempt to do so did not affect his right of survivorship. Upon her death he became the absolute owner of the whole property, and the respondents as his grantees succeeded to such ownership.

By the Court.—Judgment is affirmed.

City of Milwaukee, Respondent, vs. Gimbel Brothers and others, Appellants.

November 7—December 4, 1906.

Preliminary injunction: Continuance pendente lite: *Discretion: Municipal corporations: Control over navigable highways: Right to maintain action to abate obstructions: Navigable waters: Harbors: Regulation by federal statutes: Effect on state control: Application for injunction: Issues raised by answer: Effect: Obstructions in navigable waters by assent of public authority.*

1. A city, under its charter authority, established a permanent dock line along a navigable river. Prior thereto piles had been driven so as to form a structure or dock platform extending into the river eleven feet beyond such dock line. This structure had not been interfered with by the public authorities, either federal, state, or municipal, for upwards of forty years. Owners of property abutting on this dock line were proposing to erect an addition to their building, extending substantially over the eleven feet beyond the established dock line, when the municipal authorities brought an action to enjoin them from erecting the proposed building, from placing obstructions in the eleven-foot space, and to compel the removal therefrom of piles and other obstructions placed by them. A temporary injunction was granted *ex parte*, which on hearing was made permanent *pendente lite*. *Held*, that it was an exercise of a wise judicial discretion to maintain the existing conditions by a properly guarded restraining order.
2. A municipal corporation may maintain a suit in equity to prevent encroachment upon or obstruction of highways by land or water under its care and charge.
3. The federal statutes regulating all harbors used in interstate commerce are merely restrictive of certain acts, and do not exclude states from prohibiting other acts within their borders as deemed necessary for public welfare and safety.
4. In an action by a municipal corporation to restrain the obstruction of a navigable highway, the complaint alleged that all structures at the place in question, ancient or in progress, obstructed navigation and were within the limits of the river. *Held*, that denials thereof, in answer and affidavits presented on a motion to dissolve a temporary injunction, only served to raise an issue on that subject, and did not warrant the reversal of an order making the temporary injunction permanent *pendente lite*.

5. The fact that the public authorities permit in a navigable river a structure in some degree interfering with navigation does not work a surrender of its authority to prevent other structures even on the same spot.

APPEAL from an order of the circuit court for Milwaukee county: LAWRENCE W. HALSEY, Circuit Judge. *Affirmed.*

Within the city of *Milwaukee,* Grand avenue, running east and west, reaches the Milwaukee river on its west bank. The defendants *Gimbel Brothers* occupied, under lease, a parcel of land on the south side of Grand avenue, bounded on the east by the Milwaukee river and on the west by West Water street, upon which, in 1906, there stood a building extending from West Water street eastward. As early as 1863 the city of *Milwaukee* had enacted an ordinance establishing a permanent dock line on the west shore of the Milwaukee river, which, on Grand avenue, was 157 feet east of the east line on West Water street, which ordinance is still in force, if valid. The east line of defendants *Gimbel Brothers'* building was some five feet west of this established dock line. Prior to 1863 piles had been driven so as to form a structure or dock platform extending some eleven feet still further east than the established dock line, which structure had never been interfered with by the public authorities, either federal, state, or municipal. Neither of these lines is shown to have had any relation to the actual shore or bank of the river in a state of nature. Defendants *Gimbel Brothers* had prepared plans and were proceeding to erect a building as an addition to the existing one, extending substantially to the line of the existing dock and approximately eleven feet beyond the established dock line. The charter of the city of *Milwaukee* empowered the common council to establish dock lines and "to restrain and prevent encroachments upon said rivers and canals and obstructions thereto." This action was commenced to enjoin the defendants *Gimbel Brothers* from proceeding with the erection of the proposed building and from driving

piles and placing obstructions in the river to the east of the established dock line, and to require them to remove and take away piles and all other obstructions already placed by them. The other defendants than *Gimbel Brothers* were the several contractors who had been employed by them to do the work, and some of whom had already driven piles eastward of the established dock line. Upon the verified complaint a temporary restraining order was made, *ex parte,* against further driving of piles and placing obstructions or doing any other work east of the established dock line, which was accompanied by an order to show cause why such restraint should not be made permanent during the pendency of the action. This was opposed upon verified answer and affidavits asserting that the old dock had been located with the consent and acquiescence of the city, and that all land west of it had been occupied adversely, notoriously, and exclusively by *Gimbel Brothers* and their predecessors in title since prior to 1863, and denying that any such space had ever been navigable water or used as such, and they alleged that they had no purpose to drive any piles or do any work to the east of the existing dock structure. Upon this showing the court made order continuing the restraint pending the action, from which order all the defendants appeal.

For the appellants there was a brief by *Winkler, Flanders, Smith, Bottum & Fawsett,* and oral argument by *F. C. Winkler.* They contended, *inter alia,* that the city of *Milwaukee* had not jurisdiction over the subject matter of the suit. 17 Am. & Eng. Ency. of Law (2d ed.) 58, 59; 21 id. 432, 433; 26 U. S. Stats. at Large, 426, 454; *U. S. v. Bellingham Bay B. Co.* 176 U. S. 211; *Willamette I. B. Co. v. Hatch,* 125 U. S. 1; *Escanaba Co. v. Chicago,* 107 U. S. 678.

For the respondent there was a brief by *John T. Kelly,* city attorney, and *Benjamin Poss,* assistant city attorney, and oral argument by *Mr. Kelly.*

DODGE, J. In this case the trial court has exercised its discretion to maintain the present *status quo* until the various issues of fact and law can be duly considered and decided. Were this not done, the damage to result from an effective removal of all claimed obstructions in Milwaukee river east of the established dock line would be vastly greater than any caused by temporary restraint of the construction of a business building, as alleged to be threatened, and the result sought by the action, namely, preventing obstruction of navigation, would be rendered impossible. Under such circumstances, if there is any reasonable probability, because of fair doubt as to either law or fact, that plaintiff may ultimately recover, it is the part of wise judicial discretion to maintain the existing conditions by a properly guarded restraining order. *Milwaukee E. R. & L. Co. v. Bradley,* 108 Wis. 467, 84 N. W. 870; *Quayle v. Bayfield Co.* 114 Wis. 108, 112, 89 N. W. 892; *Bartlett v. L. Bartlett & Son Co.* 116 Wis. 450, 460, 93 N. W. 473; *Chain Belt Co. v. Von Spreckelsen,* 117 Wis. 106, 119, 94 N. W. 78. Maintenance of suit in equity by a municipal corporation to prevent encroachment upon and obstruction of highways by land or water under its care and charge is entirely settled in this state. *Eau Claire v. Matzke,* 86 Wis. 291, 56 N. W. 874; *Pewaukee v. Savoy,* 103 Wis. 271, 279, 79 N. W. 436; *Wauwatosa v. Dreutzer,* 116 Wis. 117, 92 N. W. 551. Hence the probability of recovery is not excluded by reason of the form of action.

As an obstacle to recovery, claimed to be certain and insuperable, it is urged that regulation of all harbors used in interstate commerce has been assumed by the federal government, and that thereby all power of the state over the subject is excluded. It would be an extreme doctrine that the United States, by anything short of express authorization, could exclude the state from the ordinary police control over the conduct of its citizens or the erection of structures within its limits, but we need consider no such question, for the federal

statutes are merely restrictive of certain acts and, on their face, evince no purpose to exclude the states from prohibiting other acts within their borders as deemed necessary for public welfare and safety. This limited purpose has already been ascribed to the statutes by the ultimate judicial tribunal in *Cummings v. Chicago,* 188 U. S. 410, 23 Sup. Ct. 472, and *Montgomery v. Portland,* 190 U. S. 89, 23 Sup. Ct. 735, which hold that even express consent by federal authority to erect structures within navigable harbors wholly within a state will not abrogate restrictions or prohibitions imposed by the state government, and that the purpose of the federal legislation is merely to supplement and not to exclude that of the several states.

As to other questions involved in the litigation, whether of law or fact, we shall hardly feel justified in declaring any final conclusion in view of the incompleteness with which they are presented by the record and the briefs. We construe the complaint as asserting that all structures, ancient or in progress, east of the established dock line do obstruct navigation of the river and are within its limits. The denials of this claim in answer and affidavits but serve to make an issue, as to which we are unable to say, with sufficient certainty, that the trial court might not have entertained such doubt as to warrant his discretion in the restraint interposed.

Counsel for appellants insist that it conclusively appears that the space between the established dock line and the east line of the proposed building, coincident with the existing dock line, never could have been navigable. We do not quite understand his meaning. If it is that the space never was under water, either practically navigable or capable of being made so, we do not think that fact conclusively appears. Whether that space was originally dry land or was part of the bed of the river, so that the state might prevent illegal occupation thereof and preserve it "forever free," in the words of the Ordinance of 1787, cannot be clearly answered from this

record. If, on the other hand, he means merely that vessels could not navigate that space because of the artificial structures placed there, the assertion is doubtless true, but not necessarily material. If it shall be found that the structure is an unlawful obstruction to the public use of a navigable river, its presence, excluding rightful passage of vessels over that spot, could not make lawful other and more complete obstruction. The fact that the government permits a structure in some degree interfering with navigation does not work a surrender of its authority to prevent other structures even on the same spot. Obviously, a fringe of platform alongside of this harbor in which vessels must pass and turn round, near enough to the water level not to interfere with protruding upper portions of hull or rigging, may less obstruct the use of the harbor than would the wall of a building on the same line. Nor because a party had driven a certain number of piles in a given space would the government be disabled from preventing driving others in the same space, if unlawful, thus making the whole structure more substantial and more difficult of abatement, which, by the way, seems to be one of the objects of the present action, although defendants assume otherwise. The complaint prays that defendants be compelled to remove and take away all piles already driven in the space east of the established dock line and also for general equitable relief, and the resolution under which the city attorney brings the suit directs him to procure the removal of existing obstructions.

We are persuaded that no error is presented by the restraining order pending the ascertainment of the rights of the parties.

By the Court.—Order appealed from is affirmed.

JOST, Executor, Appellant, vs. WOLF and another, Respondents.

November 7—December 4, 1906.

Appeal and error: Findings, when disturbed: Varying written contracts: Parol evidence: Consideration: Recitals in deeds: Conclusiveness: Vendor's lien: Gift of land.

1. Where, on a careful examination of the evidence, it cannot be said that the findings of the trial court are antagonized by a clear preponderance of the evidence, they will not be set aside.
2. Although a written contract may be the complete and final agreement between the parties at the time of its signature, it constitutes no obstacle to the making of a new, different, or substitutionary agreement thereafter by mutual consent.
3. Such subsequent agreement would constitute a new contract, and, if it rested mainly in parol, would be provable by all ordinary means of evidence.
4. In such case, if the new oral contract consisted in the re-adoption of a plan agreed upon or discussed before the written contract, the details of such plan can be proved to throw light upon the terms of the later oral contract, although they are inadmissible to prove that the written contract did not correctly express the agreement between the parties existing at the time of its execution.
5. In an ordinary deed of conveyance the recital that there has been paid a consideration, and what that consideration was, is merely a statement of fact theoretically necessary to exist in order that the conveyance may take effect. The correctness of the recital is wholly immaterial. It binds no one as to its correctness, but may be proved, *aliunde*, to have been greater or less or different in character, so long as it is not inconsistent with the existence of some consideration to support the conveyance.
6. Where a preliminary land contract recited that the vendee was to pay $5,600 for the land, and the deed of conveyance recited a consideration of $5,500, there is thereby presented no obstacle to proof that the real consideration was $600 in money, the assumption of an existing mortgage, and an agreement by the vendee to hold the property subject to an equity in a third person to acquire the title upon payment of advances made.
7. In such case the payment of the $600 and the actual assumption of the mortgage left no debt upon which to base a vendor's lien.
8. The execution and delivery of a deed, whether to the donee or to some one for him, is an entirely sufficient completed execution of a gift of the land.

APPEAL from a judgment of the circuit court for Calumet county: GEO. W. BURNELL, Circuit Judge. *Affirmed.*

Action to foreclose vendor's lien for $1,660, alleged balance of purchase of certain lands conveyed by plaintiff's testator to the defendant *George Wolf* on December 16, 1903, by a deed expressing and acknowledging receipt of consideration of $5,500, whereof $3,340 consisted in assumption of mortgage, $600 was concededly paid in cash, and the balance is claimed to be due and unpaid, the true consideration being alleged to be $5,600. It appeared that Thomas Suttner, being aged and infirm, owned an eighty-acre farm valued by different witnesses at from $4,500 to $5,500, incumbered by a mortgage of $3,340, with some accrued interest; that from time to time he solicited *John Suttner,* his son, to take over the farm and supply Thomas with a home there, which *John* for a long time was unwilling to do. Thomas Suttner thereafter proceeded to hold an auction sale of both farm and personal property, and published notices to that effect. Between the publication and the date of sale he again urged *John* to take the farm, and made proposal to him that he should have it upon assumption of the mortgage and payment of only $600, the father thereby being provided with a home during the rest of his life. To this *John* consented, concurrently with his friend, the other defendant, *George Wolf,* who undertook to supply him with the $600. It was deemed necessary, however, apparently to preserve faith with the public, that the auction sale should nevertheless be held, and the father, Thomas, insisted that at such sale the land be in form bid off by *George Wolf,* no matter at what price, that the arrangement with *John* might be carried out. *Wolf* accordingly bid at said sale, until the farm was finally struck off to him at $5,600, contrary to his own advice that it be sold to a stranger when it reached $5,300, which he considered the limit of its value. The clerk of the auction had brought with him an ordinary form of a land contract, which was filled out

in accordance with the terms of the auction sale and signed by Thomas Suttner and *George Wolf,* and the $600 was paid; the contract providing that the balance should be settled at the time of making deed. After the sale the three parties, Thomas Suttner, *John Suttner,* and *George Wolf,* together with a scrivener, met for the purpose of carrying into effect by conveyance the previous contract between Thomas and *John.* The question was then raised as to how *Wolf* was to be protected for his advancement of $600, and Thomas Suttner proposed that, instead of deeding directly to *John,* he would deed the land to *Wolf* upon *Wolf's* agreement that *John* should have the equity therein above the $600. A deed was made accordingly, except for some reason the consideration named was $5,500 instead of $5,600. No explanation of the arrangement was made to the scrivener, further than to tell him that the balance of the purchase price was all settled between the parties. The land contract was delivered up and destroyed. After such conveyance *Wolf* entered into a written agreement with *John Suttner* recognizing the latter's equity in the land or any proceeds thereof in excess of the $600 and the first mortgage. Thomas Suttner claimed the land contract to be binding and the balance of the price to be due him. Upon findings to substantially the foregoing effect, and also to the effect that no undue influence or fraud was exercised upon Thomas Suttner, the court held that there was no indebtedness for any portion of purchase price, and entered judgment dismissing the complaint, from which judgment the plaintiff, executor of Thomas Suttner, who died pending the action, appeals.

For the appellant there was a brief by *Nash & Nash,* and oral argument by *G. E. Nash.*

J. E. McMullen, for the respondents.

Dodge, J. After careful examination of the evidence, consisting largely as it does of testimony of witnesses of greater

or less intelligence and fairness, and varying in command of the English language, as also in capacity of expression, we cannot say, with the requisite certainty, that the trial court's findings as to the terms of the contract, or those against fraud and undue influence, are antagonized by that clear preponderance of evidence which alone can justify this court, on appeal, to set them aside. No comment we might make upon the conflicting evidence could add materially to the lucid and highly judicial analysis thereof contained in the opinion filed by the circuit judge. We must, therefore, proceed upon the established existence of the facts so found as a basis for consideration of other questions.

Appellant contends that the trial court erred in receiving and considering any parol evidence, because the land contract made on the day of the auction is the final and conclusive expression of the agreement between the parties. There is some evidence, perhaps, tending to show that the making of this writing was, to the understanding of both parties, such a matter of mere color or form, like the auction which preceded it, that insistence upon it as conclusive would work a fraud and thus bring the situation within one of the exceptions to the rule against contradicting or modifying a written instrument by parol. *Juilliard v. Chaffee,* 92 N. Y. 529; *Baird v. Baird,* 145 N. Y. 659, 663, 40 N. E. 222; *Jamestown B. C. Asso. v. Allen,* 172 N. Y. 291, 303, 64 N. E. 952. Such situation has not, however, been considered by the trial court, or intentionally declared in the findings, and we shall not find necessity to declare ourselves upon it for reasons to be stated. If we concede that the land contract must be taken as the complete and final agreement between plaintiff and *Wolf* at the time of its signature, it nevertheless constituted no obstacle to the making of a new, different, or substitutionary agreement thereafter by mutual consent. Although plaintiff had agreed to sell, and defendant to buy, this land for $5,600, it was perfectly competent for either to release the other en-

tirely or in part, or for both to agree that sale should be made, but at another or different consideration; also that the agreed price might be paid in any manner. Any such subsequent arrangement would constitute a new contract, resting mainly in parol, and therefore provable by all ordinary means of evidence. If, as is found to be the fact, it consisted in re-adoption of a plan agreed upon or discussed before the written contract, the details of such plan could be proved to throw light upon the terms of the later oral contract, although inadmissible to prove that the written contract did not correctly express the agreement between the parties existing at the time of its execution. *Lathrop v. Humble,* 120 Wis. 331, 97 N. W. 905. Further, appellant urges that the land contract and the deed executed ten days later are but parts of one transaction, and, read together, constitute complete written expression of its terms not subject to variation by parol. This is, however, merely begging the question of fact whether they were parts of one transaction, or whether another transaction took place after the written land contract and the deed was made in execution of such later contract. This question of fact the trial court has resolved against appellant, and, as we have already said, upon sufficient evidence.

Some contention is made that the recital in the deed of a consideration of $5,500 is conclusive upon defendant and not open to dispute by parol. This contention, if sustained in this case, presents the anomaly that defendant, who did not sign the deed at all, is bound conclusively by a mere recital therein that the deed had been made for a consideration of $5,500, while the grantor, who formally executed the instrument over his seal, is not bound by the solemn avowal that the entire consideration had been paid. The position is supported by but two citations, viz., *Powers v. Spaulding,* 96 Wis. 487, 71 N. W. 891, and *Desmond v. McNamara,* 107 Wis. 126, 82 N. W. 701, neither of which cases dealt with attempted explanation of a mere recital of consideration, but

with express contractual stipulations on the part of grantees embodied in deeds accepted by them. In the first case the attempt was to prove that an express written agreement to pay all cost of certain improvements was limited by parol to a fixed amount; in the second, to show a parol agreement that the grantor should pay a certain mortgage in contradiction of express stipulation in the deed that grantee should assume it. The inconclusiveness of a mere deed of conveyance to exclude other evidence of the various terms of the contract in part execution of which it is made has been declared by this court so often as to hardly warrant further statement. Such deed, on its face, shows that it is not an attempt to reduce to writing the agreement between the parties, but merely to execute some part of a broader agreement. A simple conveyance is unilateral, while a contract is, in its nature, at least bilateral. *Perkins v. McAuliffe,* 105 Wis. 582, 81 N. W. 645; *Brader v. Brader,* 110 Wis. 423, 85 N. W. 681. Of course deeds vary in form, and some contain more or less expression of the contractual undertakings of one or both parties. As to such subjects the written expression, like any other, is exclusive of oral proof. *Powers v. Spaulding, supra; Desmond v. McNamara, supra;* 2 Page, Cont. § 1205; 4 Wigmore, Ev. § 2433. In antithesis to such expressions of that which either party promises are those mere declarations, recitals, or acknowledgments of existing facts, not contractual at all. These, while perhaps *prima facie* evidence of such facts, are not conclusive, nor exclusive of other evidence. Indeed, the rule against extrinsic evidence to vary a written contract is not so much a rule of evidence as one of substantive law, based on the idea that, generally, justice is promoted by holding parties bound when they deliberately reduce their understanding to writing, whatever the prior negotiation. Perhaps the best illustration of the distinction between mere recital or acknowledgment of a fact and contractual stipulations is found in the cases as to receipts, discriminating between those which merely ac-

knowledge the fact of payment and those which involve agreements such as discharge or release. 2 Page, Cont. §§ 1201, 1202; *Twohy M. Co. v. Estate of McDonald,* 108 Wis. 21, 83 N. W. 1107; *Seeger v. Manitowoc S. B. Works,* 120 Wis. 11, 97 N. W. 485. In our ordinary deeds of conveyance the recital that there has been paid a consideration, and what that consideration was, is merely a statement of a fact theoretically necessary to exist in order that the conveyance might take effect, but which early became practically a mere immaterial fiction by reason of the rule that the grantor's seal raised a conclusive presumption of a consideration sufficient to support the instrument. Hence one cannot deny existence of some consideration in order to defeat the conveyance. To that end, however, the correctness of the recital was and is wholly immaterial, and the authorities, practically without exception, recognize that it binds no one as to its correctness, but may be proved, *aliunde,* to have been greater or less or different in character, as property or services instead of money, and the like, so long as it is not inconsistent with the existence of some consideration to support the conveyance. *Mowrey v. Vandling,* 9 Mich. 39; *Strohauer v. Voltz,* 42 Mich. 444, 447, 4 N. W. 161; *Dodder v. Snyder,* 110 Mich. 69, 67 N. W. 1101; *Harts v. Emery,* 184 Ill. 560, 566, 56 N. E. 865; *Barbee v. Barbee,* 109 N. C. 299, 13 S. E. 792; *Tolman v. Ward,* 86 Me. 303, 29 Atl. 1081; *M'Crea v. Purmort,* 16 Wend. 460; *Horner v. C., M. & St. P. R. Co.* 38 Wis. 165, 176; *Kickland v. Menasha W. W. Co.* 68 Wis. 34, 38, 31 N. W. 471; *Ohlert v. Alderson,* 86 Wis. 433, 57 N. W. 88; *Perkins v. McAuliffe,* 105 Wis. 582, 81 N. W. 645; *Cuddy v. Foreman,* 107 Wis. 519, 83 N. W. 1103; *Brader v. Brader,* 110 Wis. 423, 85 N. W. 681; *Butt v. Smith,* 121 Wis. 566, 99 N. W. 328; *Mueller v. Cook,* 126 Wis. 504, 105 N. W. 1054. In the deed before us the recital of $5,500 consideration is entirely typical. It presents nothing of promise or contract, merely a declaration of the fact. It therefore

presents no obstacle to proof that the real consideration was $600 in money, assumption of the existing mortgage, and agreement by the grantee to hold the property subject to an equity in *John Suttner* to acquire the title upon payment of the advances made by *Wolf*. This contract, which the court, in effect, found to have been made, left no debt from *Wolf* to Thomas Suttner upon which to base a vendor's lien. The question of the legal validity of such an agreement with reference to real estate, as between *Wolf* and *John Suttner*, is of no materiality if Thomas chose to accept the promise, which, by the way, *Wolf* evinces every purpose to carry out to the satisfaction of *John*.

Some discussion occurs in the briefs as to the validity of a suggested gift to *John Suttner* by his father of $1,660 of the promised consideration for the land. In the view taken by the trial court as to the terms of the contract, and with which we concur, of course there never arose any debt from *Wolf* to Thomas Suttner, and therefore no gift of such debt. If gift at all was made, it was of the land, not of any portion of a promised price first owing to Thomas and afterward transferred to *John*. Of course the execution and delivery of a deed, whether to the donee or to some one for him, was an entirely sufficient completed execution of the gift of the land. *Albright v. Albright*, 70 Wis. 528, 36 N. W. 254; *Second Nat. Bank v. Merrill*, 81 Wis. 142, 50 N. W. 503; *Kittoe v. Willey*, 121 Wis. 548, 99 N. W. 337.

We are unable to discover any error in the proceedings or decision of the trial court.

By the Court.—Judgment affirmed.

The following opinion was filed January 4, 1907:

SIEBECKER, J. (*dissenting*). While I fully concur as to the legal principles upon which the decision is based, I am unable to concur in their application to the facts established

by the evidence. The ground of the decision is that the written contract for the sale of the farm by Suttner to *Wolf*, made on December 10, 1903, immediately after the auction sale, was abrogated by a subsequent parol agreement executed December 16, 1903, the date of the deed. The rule that evidence so clear and convincing as to leave no reasonable controversy on the subject is required to set aside a solemnly executed instrument for the sale of real estate is so well established and universally recognized that citation of authority is needless. In approaching the questions of the case it would be erroneous to consider that any of the negotiations which preceded and led up to the execution of the land contract on December 10, 1903, were not merged in it. It is a well-recognized rule that when parties make written agreements covering the subject of their engagements, without uncertainty as to their object and extent, it is conclusively presumed that they contain the whole thereof, and they cannot be contradicted or varied by parol evidence. That this contract between Thomas Suttner and *Wolf* for the sale of the farm included an agreement that the purchase price of the farm should be $5,600 is not in dispute. This, then, is conclusive on them unless it is subsequently altered by a new agreement. That the land contract and the consideration specified in it were intended to be binding by the parties is significantly corroborated by the declaration of *Mr. Wolf* that it was made because the old gentleman was aged and feeble, and that he wanted something to show that he purchased the land to enable him to enforce the sale in case of Suttner's death before a deed was executed. This is the strongest and most convincing proof that it expressed their engagement, and that he relied on it as expressive of the agreement they had made. But the trial court found, and this court affirms the conclusion, that the parties, mutually agreeing to a reduction of the consideration from $5,600 to $4,000, altered it by parol on the day the deed was made. This inference is, to my mind, not

warranted by any interpretation of the evidentiary facts. No change is shown or claimed to have been made before the day when the deed was executed. The witnesses testifying on this subject at the time the deed was executed were Thomas Suttner, his son *John,* August Dorn, the scrivener, and *George Wolf.* Thomas Suttner denies at every point that he remitted anything from the amount agreed upon. The defendant *George Wolf,* testifying on the subject, states: When Dorn, the scrivener, was about to draw the deed, he asked Mr. Suttner what consideration was to be inserted, and that Mr. Suttner then turned to *Wolf,* saying: "Well, how shall we put it in?" and that *Wolf* then replied: "It is yours; I have nothing to do with how much we put in;" that Suttner then said that $5,500 was the last bid before *Wolf's* and directed Dorn to insert this sum in the deed; that when the deed was drawn, providing for the assumption of the $3,400 mortgage, $600 had been paid, and that Mr. Dorn said to Suttner: "Now, Mr. Suttner, I have got some mortgage notes here and blanks; what shall I make for the rest of the purchase money, quite a little difference yet?" To this Suttner is said to have replied: "That is all settled; you have got no more to do; just finish up the deed;" and that *Wolf* then stated to Dorn: "Well, finish up the deed, and we will talk it over afterwards." They did not talk it over afterwards. This narrative of events at the time the deed was executed is in substance corroborated by the evidence of Dorn and *John Suttner,* and is all of the positive evidence on the subject of the reduction of the purchase price of the land.

The court laid stress on the transaction tending to show that *Wolf* agreed to deed the land to *John Suttner,* and on some admission of Thomas Suttner to the effect that *John* was to have the place for $4,000, as corroborative of the claim that it was understood that $4,000 was the amount agreed to be paid. If the proof were sufficient to show a change of consideration from the $5,600 contained in the written contract,

it would at most show a reduction to $5,500, the amount written into the deed, but I deem it insufficient to show that even this reduction was made. Giving the fullest weight to the positive testimony of the parties and the circumstances tending to show that a change of consideration from that expressed in the contract was considered by the parties, it seems to me wholly inadequate to overthrow the written contract, and I think the court clearly erred in holding that the written agreement was abrogated and a different consideration agreed upon by the parties. In my view the plaintiff is entitled to recover $1,600.

WAUKAU MILLING COMPANY and another, Respondents, vs. CITIZENS' MUTUAL FIRE INSURANCE COMPANY OF JANESVILLE, WISCONSIN, Appellant.

SAME, Respondents, vs. BOWER CITY MUTUAL FIRE INSURANCE COMPANY OF JANESVILLE, WISCONSIN, Appellant.

SAME, Respondents, vs. CENTRAL MANUFACTURERS' MUTUAL INSURANCE COMPANY OF VAN WERT, OHIO, Appellant.

November 7—December 4, 1906.

Fire insurance: Forfeiture: Breach of promissory warranty: Suspension of business: "Cease to be operated:" Application: Admissibility: Statutes: Foreign and domestic insurance companies.

1. Policies of insurance of the Wisconsin standard form provided, among other things, that the entire policy, unless otherwise provided by agreement indorsed thereon or added thereto, should be void if the subject of insurance were a manufacturing establishment and it ceased to be operated for more than ten consecutive days. The risk covered a flouring mill operated by water power. By reason of severe weather the water in the mill race froze, and the insured was therefore unable to operate the mill for more than ten consecutive days, but was operating it when the loss occurred. The agent, when soliciting the insurance, knew the mill was operated by water power, and that in severe weather the race might freeze and thereby prevent its

operation. The mill was not in operation when the agent examined the premises. *Held:*

(1) The specified clause in the policies must be given a reasonable construction in the light of the conditions attending the subject matter of the contract and within the contemplation of the parties when the contracts were made.

(2) The cessation of operation covered by the policies had no reference to such cessation as occurred in the usual course of the business of the insured or as arose from causes beyond its control.

(3) The fact that the mill could not be operated in severe weather on account of lack of power was an existing fact and known to the insurance companies at the time of issuing the policies, and therefore the policy provision respecting nonoperation did not apply.

2. Secs. 1941—1 to 1941—13 and 1945*a*, Stats. 1898, respecting "mutual companies in cities and villages," have reference to insurance companies organized under the laws of Wisconsin only, and have no reference to foreign mutual fire insurance companies.

3. Sec. 1945*a*, Stats. 1898 (requiring that all fire insurance corporations shall, upon the issue or renewal of any policy, attach to such policy or indorse thereon a true copy of any application which by the terms of such policy is made a part thereof or of the contract of insurance or referred to therein, or which may in any manner affect the validity of such policy), excepts from its operation, among other insurance corporations, mutual companies in cities and villages. Plaintiff signed an application, addressed to an Ohio mutual insurance company, requesting $4,000 of insurance on its flouring mill and represented that when the mill was not in operation it maintained therein a watchman. The agent, on receipt of such application, placed $2,000 of the insurance in the Ohio company, and $1,000 each in Wisconsin city mutual companies. In an action to recover for a loss under such policies the defendants offered proof of the application and its falsity. The application was not attached to the Wisconsin policies or referred to therein. The testimony was ruled out. *Held:*

(1) The ruling was proper as to the Ohio company, since it was not within the exceptions of sec. 1945*a*.

(2) The ruling was also proper as to the domestic companies, since they were not parties to the application addressed exclusively to the Ohio company.

APPEAL from a judgment of the circuit court for Winnebago county: GEO. W. BURNELL, Circuit Judge. *Affirmed.*

The plaintiff *Waukau Milling Company* obtained insurance upon its mill and machinery under three separate policies with the defendants, one for $2,000 in the *Central Manufacturers' Mutual Insurance Company,* of Van Wert, Ohio, and a policy in each of the other two defendant companies for $1,000 each. A loss occurred by fire, in consequence of which separate actions were commenced against each company. These actions were afterwards consolidated. The plaintiff *R. H. Hackett* joined as mortgagee of the insured premises. Several defenses were raised in the answers, but were finally reduced to two, namely: (1) That the policies were avoided because the mill ceased to be operated for more than ten consecutive days, contrary to the stipulations in the policies. (2) That the plaintiff failed to keep a watchman on the premises at all times when the mill was not in operation. The case was tried by the court and a jury and the following verdict returned:

"(1) Did Lorenze at the time he made application for insurance state to Brownell in substance that he expected that, during a part of the time in the following winter, the mill would not run on account of the weather? *A.* Yes. (2) Did the mill run after the 29th of November, 1904, at all times when it was practicable to do so with the water which they then had? *A.* Yes. (3) Was the lack of water power during the winter due to any want of ordinary care and prudence on the part of the plaintiff or its officers and agents? *A.* No."

Motions were made by both sides for judgment, and motions to set the verdict aside and for a new trial were made on behalf of defendants. Judgment was ordered and entered for plaintiffs upon the verdict for $1,058.75 against each of defendants *Citizens' Mutual Fire Insurance Company* and *Bower City Insurance Company,* of Janesville, and against the *Central Manufacturers' Mutual Insurance Company* for $2,077.23. The judgment further provided that, at the time of issuing the policies and since, the plaintiff *R. H. Hackett* had an interest in the insured property as mortgagee, and at

the time of trial this interest amounted to $2,500 with interest at six per cent. from October 8, 1904, and that there be paid to him as such mortgagee $2,500 and interest. From this judgment defendants appealed.

John M. Whitehead, for the appellant *Citizens' Mutual Fire Insurance Company.*

Thos. S. Nolan, for the appellant *Bower City Mutual Fire Insurance Company.*

Myron H. Beach, for the appellant *Central Manufacturers' Mutual Insurance Company.*

For the respondents there was a brief by *Barbers & Beglinger,* and oral argument by *Charles Barber* and *Fred Beglinger.*

KERWIN, J. The property covered by the policies in question consisted of a three-story water-power flour and feed mill building with equipments. It was located in Waukau, a small village in Winnebago county, Wisconsin, near a small creek which is fed by Rush lake. For several years prior to the date of the policies in suit the mill had been run only by water power, and during the winter, when water power was not available, it was not operated. The insurance was solicited by an agent of the companies named Brownell, who visited and examined the property November 9, 1904, accompanied by Mr. Lorenze, president of plaintiff *Waukau Milling Company.* Brownell knew that the mill was a water-power mill and the conditions and situation of the water power, and that in severe weather the race which carried the water from the pond to the mill would freeze and thereby prevent the operation of the mill. After examination of the property the agent took a written application from Mr. Lorenze for $4,000 of insurance on the property in the defendant *Central Manufacturers' Insurance Company,* of Van Wert, Ohio, the application being addressed to that company only, and forwarded the same to H. J. Cunningham, agent of the three companies, at Janesville, Wisconsin. Cunningham, instead

of putting the insurance in the *Central Manufacturers' Insurance Company,* in accordance with the application, split it up, putting $2,000 in the Ohio company and $1,000 in each of the other companies, and the three policies were forwarded to plaintiff *Waukau Milling Company.* The policies were all of the Wisconsin standard form and none of them in any way referred to the application. This application was offered in evidence by defendants on the trial and ruled out. At the time the agent, Brownell, examined the premises the mill was not in operation, and did not commence to run until about three weeks thereafter. From November 29, 1904, to January 1, 1905, the mill was operated, but during the fore part of January, 1905, the weather became so severe that the water in the race froze, and, owing to the severity of the winter, plaintiffs were unable to operate the mill until about March 24, 1905, at which time they resumed operation. The policies were issued November 10, 1904. In March, 1905, Mr. Lorenze obtained from the defendants permission to make alterations and repairs and install additional machinery in the mill. This permission was granted in the form of a rider, which was attached to each policy, dated March 13, 1905. On March 30, 1905, the fire which destroyed the property occurred. The application for insurance to the *Central Manufacturers' Insurance Company,* of Van Wert, Ohio, heretofore referred to, contained question and answer to the effect that the plaintiff *Waukau Milling Company* kept a watchman on the premises at all times when the mill was not in operation.

1. It is claimed on the part of the defense that each policy became void because the mill ceased to be operated, contrary to the provisions of the policy. Each policy provides:

"This entire policy, unless otherwise provided by agreement indorsed hereon or added hereto, shall be void . . . if the subject of insurance be a manufacturing establishment and . . . if it cease to be operated for more than ten consecutive days."

The question, therefore, arises under this head, whether the failure to operate the mill for more than ten consecutive days because of lack of water power occasioned by the severe weather rendered the policies void. The clause in the policy referred to must have a reasonable construction in the light of the conditions attending the subject matter of the contract and within the contemplation of the parties at the time the contract was made. It will be admitted that the provision is not an arbitrary one which will be enforced according to its letter and under all circumstances, regardless of whether the cause of such failure to operate is beyond the control of the assured, or whether the nonoperation be such as may fairly be said to have been within the contemplation of the parties when the contract was made as attending the use of the insured property. So it has often been held that a mere temporary cessation of operation due to natural causes is not a violation of a clause similar to the one under consideration. *Ladd v. Ætna Ins. Co.* 147 N. Y. 478, 42 N. E. 197; *Whitney v. Black River Ins. Co.* 72 N. Y. 117; *Bellevue R. M. Co. v. London & L. F. Ins. Co.* 4 Idaho, 307, 39 Pac. 196. Where, as in the case at bar, it was known to the insurance company at the time of issuing the policy that the insured mill might, by reason of lack of power during the term covered by the policy, be forced to cease operation for a part of the season, it must follow that the period of such cessation must have been contemplated by the parties to the contract as not falling within the clause against cessation of operation. The cessation of operation covered by the policy manifestly has no reference to such as occurs in the usual course of the business, or such as arises from causes beyond the control of the insured. Here the evidence shows, and the jury found, that the defendants knew at the time the policies were issued that during the ensuing winter the mill might not run on account of weather conditions causing failure of water power, and that the mill did in fact run at all times practicable when it had power, and that the lack of power during

the times it was not operated was not due to any want of ordinary care on the part of the milling company. So it seems clear that the parties contracted with reference to the existing conditions of the business, and contemplated that the mill might not be operated during part of the season on account of lack of power, and that such failure to operate would not come within the clause of the policies in question. Such clause cannot work a forfeiture because of failure to operate on account of conditions which must have been in contemplation of the parties when the contract of insurance was made. We think the great weight of authority supports the doctrine that the failure to operate under the circumstances in this case was not such a cessation of operation as is contemplated by the clause in the policies in question. *Ladd v. Ætna Ins. Co.* 147 N. Y. 478, 42 N. E. 197; *Whitney v. Black River Ins. Co.* 72 N. Y. 117; *Bellevue R. M. Co. v. London & L. F. Ins. Co.* 4 Idaho, 307, 39 Pac. 196; *Rosencrans v. N. A. Ins. Co.* 66 Mo. App. 352; *American F. Ins. Co. v. Brighton C. Mfg. Co.* 125 Ill. 131, 17 N. E. 771; *City P. & S. M. Co. v. Merchants', M. & C. M. F. Ins. Co.* 72 Mich. 654, 40 N. W. 777; *Poss v. Western A. Co.* 7 Lea, 704; *May v. Buckeye M. Ins. Co.* 25 Wis. 291.

In *Ladd v. Ætna Ins. Co.* 147 N. Y. 478, 42 N. E. 197, the policy covered a water-power sawmill building and machinery, and contained a stipulation similar to the one in question here. Operation ceased for about a month, owing to the illness of the sawyer. It was claimed that the policy was rendered void because the mill ceased to be operated for more than ten consecutive days, contrary to the provisions of the policy. The court held that the temporary shutting down of the mill on account of sickness of the operator did not constitute a violation of the policy. At page 484 (42 N. E. 198) the court said:

"We are unable to agree with the defendant's contention that this clause of the policy is too clear for argument, and that any temporary cessation of the operation of the ma-

chinery in a manufacturing establishment by reason of sickness, breakdown, low water, or other unavoidable cause, although it is not the intent of the insured to cease operating or to allow the premises to become vacant or unoccupied, is a clear violation of its provisions."

In *Whitney v. Black River Ins. Co.* 72 N. Y. 117, the policy contained the provision rendering it void in case the premises should become "vacant and unoccupied." In this case the mill was operated by water power, and it was held that delays and interruptions incident to the business, such as low water, diminished custom, or derangement of machinery causing a temporary discontinuance of the use of the mill, did not constitute a breach of the condition, or render the mill "vacant and unoccupied" within the meaning of the policy. At page 120 the court said:

"The description in the policy shows that the defendant knew that the mill was operated by water power, and as it was a sawmill the insurer must be presumed to have known that sawmills are or may be used as well for custom work as for sawing the logs of the owner, and, as machinery was used for the operation of the mill, the fact that it was liable to break down and need repairs must also have been within the contemplation of the parties when the policy was issued. The interruptions of the business and the discontinuance of the active use of the sawmill by reason of low water, diminished custom, or derangement of the machinery, if held to be a violation of the condition and to create a vacancy and non-occupation of the building within the true meaning of the condition, would greatly impair the value of the contract as a contract of indemnity, and the result would be that the contract would be deemed forfeited by the happening of events which might reasonably have been anticipated, and which were among the common incidents of the business carried on on the insured premises."

In *Bellevue R. M. Co. v. London & L. F. Ins. Co.* 4 Idaho, 307, 39 Pac. 196, the clause in the policy was identical with those in the policies before us. The mill ceased to be operated because the mill race froze up in the winter, as it had

for several years prior to the writing of the policy, which fact was known to the agent of the company before issuing the policy. It was held that the period of nonoperation was incident to the use of the mill and taken into consideration by the insurance company when it issued the policy. In *American F. Ins. Co. v. Brighton C. Mfg. Co.* 125 Ill. 131, 17 N. E. 771, the policy contained a clause providing that, if the subject of insurance be a manufacturing establishment and ceased to be operated without agreement indorsed upon the policy, the insurance should cease. The property covered was a cotton-mill building and the plant necessary to run it. Operations were suspended, so far as running the mill was concerned, for about eight days before the fire because of difficulty in securing the proper quality of cotton. It was claimed that such suspension of operation was a ceasing to operate within the clause of the policy and avoided the insurance, but it was held that there was no cessation of operation within the meaning of the policy, but simply a temporary suspension of business. In *City P. & S. M. Co. v. Merchants', M. & C. M. F. Ins. Co.* 72 Mich. 654, 40 N. W. 777, the policy provided that if the mill should cease to be operated, unless shut down for repairs, without a notice to or consent of the company, the policy should become void. The mill was a shingle mill and was operated in connection with a planing mill. The shingle mill had not been operated from July 29 to September 10, 1886, at which latter date it was burned. The mill was not operated because the stock of logs had been exhausted, and a new supply was expected from day to day, but their delivery was delayed on account of a low stage of water. It was held that the ceasing to operate was a mere temporary suspension, and that such suspension could not be regarded as a "ceasing to operate" within the meaning of the policy. In *Poss v. Western A. Co.* 7 Lea, 704, the factory shut down by reason of an epidemic of yellow fever, and was not in operation at the time of the fire. It was

claimed that there was a ceasing to operate which rendered the policy void. It was held that the clause in the policy referred to a permanent and not a temporary cessation of operation of the establishment, and that such failure to operate occasioned by the epidemic was not a permanent cessation of operation, and therefore did not avoid the policy. Referring to this clause the court said:

"It could never have been intended to apply to a ceasing to operate occasioned by the usual incidents to the business, among which would be the impossibility of procuring operatives temporarily for any cause."

The doctrine of the foregoing cases is in harmony with the rule laid down by this court in *May v. Buckeye M. Ins. Co.* 25 Wis. 291.

We shall not extend this opinion by a review of the numerous cases cited to our attention by counsel for defendants, but may say in passing that they have received careful attention. Many of them rest upon the doctrine that evidence of parol agreements at or prior to the time of issuing the policy, or evidence of waiver of conditions as to future conduct respecting the subject matter of the insurance contrary to the provisions of the policy, is not admissible. Other cases cited recognize the distinction between agreements respecting waiver of conditions as to future conduct and knowledge of existing conditions respecting the property insured. In *Sowers v. Mutual F. Ins. Co.* 113 Iowa, 551, 553, 85 N. W. 764, the court said:

"While an insurance company may be bound by knowledge of its soliciting agent regarding past or present conditions, such an agent has no power to waive future conditions."

In *Stone v. Howard Ins. Co.* 153 Mass. 475, at page 480 (27 N. E. 6), the court said:

"Where an existing fact is at variance with a clause of an insurance policy, and is known by the company to be so,

there may be an implication that the clause is not insisted on. *Newmarket Sav. Bank v. Royal Ins. Co.* 150 Mass. 374, 23 N. E. 210. But a clause which makes express provision for the future cannot be thus done away with."

In *McNierney v. Agricultural Ins. Co.* 48 Hun, 239, at page 243, the court said:

"It is now well settled that knowledge of an existing fact that would avoid the policy from its date will estop an insurer from insisting upon such fact as a breach of a warranty. *Van Schoick v. Niagara F. Ins. Co.* 68 N. Y. 434; *Woodruff v. Imperial F. Ins. Co.* 83 N. Y. 133; *Short v. Home Ins. Co.* 90 N. Y. 16."

The point was considered by this court in *Welch v. Fire Asso.* 120 Wis. 456, 461, 98 N. W. 227, where it is said:

"In *Roberts v. Continental Ins. Co.* 41 Wis. 321, after citing a long line of decisions in this court, it was said, in effect, that if, when the agent of an insurance company delivers a policy of insurance, he has knowledge of facts as regards the subject of the insurance inconsistent with the terms of the policy, the assurer, by accepting the premium, is estopped from declaring the policy void because the terms thereof were not so changed in writing as to conform to the facts," and citing a long line of decisions to that effect.

The fact that the mill could not be operated in severe winter weather on account of lack of power was an existing fact and known to the companies at the time of issuing the policies. The provision, therefore, respecting nonoperation had no reference to temporary cessation of operation occasioned by lack of power.

2. The defense that no watchman was kept in the mill turns upon whether the application to the defendant Ohio company was admissible and binding upon the plaintiff. None of the policies refer to this application or require the keeping of a watchman, so, unless the application is a part of the contract, there was no requirement for a watchman, and hence no violation of the policy for failure to keep one in the

mill. The application was addressed to the Ohio company and made no reference to the other companies or the Janesville agency. It called for $4,000 insurance in the Ohio company for five years, and contained the following provision:

"And the applicant hereinbefore named, by accepting this policy bearing even number and date herewith, becomes a member of this company and agrees to pay it the premium annually during the life of this policy, and, in addition thereto, such sum or sums, in no event to exceed in the aggregate five times the amount of said annual premium, at such time or times, in such manner, and by such instalments as the directors of said company shall assess or order, pursuant to its charter and by-laws and the laws of the state of Ohio. And warrants the answers to the above questions to be full, true, and material to the risk and shall be continuing warranties during the life of said policy; and this application is made the basis upon which said policy is issued and becomes a part of same."

The application was excluded by the court below, and the ruling in that regard is complained of. It is claimed that the application was admissible as to the Ohio company because it was a "mutual company in cities and villages" within the meaning of sec. 1945*a*, Stats. 1898. The statute provides:

"All fire insurance corporations except town insurance corporations, millers' and manufacturers', mutual companies in cities and villages, druggists' mutual companies, church insurance corporations and retail lumber dealers' insurance associations shall, upon the issue or renewal of any policy, attach to such policy or indorse thereon a true copy of any application or representations of the assured which by the terms of such policy are made a part thereof or of the contract of insurance or referred to therein, or which may in any manner affect the validity of such policy. The omission so to do shall not render the policy invalid, but if any corporation neglect to comply with the requirements of this section it shall forever be precluded from pleading, alleging or prov-

ing such application or representations, or any part thereof, or the falsity thereof or any part thereof in any action upon such policy; and the plaintiff in any such action shall not be required in order to recover either to plead or prove such application or representations, but may do so at his option."

It is claimed by counsel for the Ohio company that "mutual companies in cities and villages" within the meaning of this statute includes the defendant Ohio company organized under the laws of Ohio, and hence that it could prove the application and the falsity thereof, although not attached to the policy or referred to therein. A careful examination of the statutes respecting mutual fire insurance companies in this state and the history of such legislation convinces us that secs. 1941—1 to 1941—13, respecting "mutual companies in cities and villages," have reference to companies organized under the laws of this state only, and that "mutual companies in cities and villages" mentioned in sec. 1945*a* refer to such companies organized under the laws of this state. These several mutual fire insurance companies excepted from the operation of sec. 1945*a* ("town insurance corporations, millers' and manufacturers', mutual companies in cities and villages, druggists' mutual companies, church insurance corporations and retail lumber dealers' insurance associations") manifestly have reference to local companies and associations within the limits of the state and authorized to organize under the laws of the state for mutual protection. Their powers are defined by statute. They are obviously intended to provide for classes of persons having, by reason of location, occupation, or association, a mutual interest in fire protection. Sec. 1941—1, Stats. 1898, provides, in effect, that any number of persons, not less than twenty-five, residing in any city or cities, village or villages in the same county, who shall own collectively insurable property of not less than $25,000 in value which they desire to have insured, may form themselves into a corporation for mutual insurance by complying with the conditions named, which include the

signing of articles of organization, reciting that they are residents of a certain city or cities or villages in some county in the state of Wisconsin; and sec. 1941—5 provides, substantially, that no such corporation shall insure any property out of the city or village in which it is located, unless a resolution be adopted by a majority of the members authorizing the directors to insure property in other villages and cities than that in which the corporation is located, and in cities and villages of counties adjoining such county. It is plain that these "mutual companies in cities and villages," restricted in their scope and powers as they are, were intended by the legislature to refer to mutual companies organized in cities and villages in this state, and have no reference to foreign mutual fire insurance companies. There is nothing in the statute to indicate that it was the intention of the legislature that secs. 1941—1 to 1941—13 should apply to corporations organized outside of the limits of the state of Wisconsin, and hence we must presume that these statutes have no operation beyond the territorial limits of the state and apply only to persons and things in this state. 23 Am. & Eng. Ency. of Law (1st ed.) 346 (bottom); *Butterfield v. Ogborn,* 1 Disney (Ohio) 550; Story, Confl. of Laws, §§ 18, 19, 20; *Chappell v. Purday,* 14 M. & W. 303. In *Farnum v. Blackstone Canal Corp.* 1 Sumn. 46, STORY, J., says:

"Every legislature, however broad may be its enactments, is supposed to confine them to cases or persons within the reach of its sovereignty."

Respecting the Janesville companies organized under the laws of this state, the application was not made to them. They cannot be said to be parties in any sense to the application made exclusively to the Ohio company, and therefore it was properly excluded as to them. The policies issued by the Janesville companies were for $1,000 each for the term of one year. They in no way referred to the application, which was made to the Ohio company for $4,000 insurance for five

years. It cannot be said that the Janesville policies were issued upon the application to the Ohio company or that such application was an application to the Janesville companies. The plaintiff *Waukau Milling Company,* therefore, did not contract with the Janesville companies that it would keep a watchman in the mill. *Vilas v. N. Y. C. Ins. Co.* 72 N. Y. 590.

We therefore hold that there was no proof that the plaintiff *Waukau Milling Company* agreed to keep a watchman in the premises, and that there was no breach of the provision in the policies respecting cessation of operation. It follows, therefore, that the judgment of the court below must be affirmed.

By the Court.—The judgment is affirmed.

ROHLOFF, Respondent, vs. AID ASSOCIATION FOR LUTHERANS IN WISCONSIN AND OTHER STATES, Appellant.

November 8—December 4, 1906.

Benefit societies: Actions: Conditions precedent: Abatement: Proofs of death: Amendment: Nonsuit: Suicide: Appeal and error: New trial: Best evidence: Public records: Competency: Hearsay.

1. Under the regulations of a mutual benefit society its contracts of insurance were payable within ninety days after the receipt of proofs of death. The original proofs were received nearly seven months prior to the commencement of the action, but an amendment thereto was received less than ninety days before the action was commenced. *Held,* that the amendment did not operate as an extension of the time of payment or of the time for the commencement of the action, and therefore the court did not err in its refusal to abate the action on that ground.
2. Under a certificate in a mutual benefit society providing, in case of the death of a member by suicide, that the only liability under the contract should be the amount of benefit assessments paid to the association by the member, the original proofs of

death contained a statement in a physician's affidavit, in answer to a question as to the direct cause of death: "Gunshot wound in heart. Case of suicide," and also a statement of the beneficiary that the insured "was killed by shooting himself in the heart, according to verdict of coroner's jury." Thereafter the beneficiary, who had no personal knowledge of the manner of assured's death, by amendment stated that she made such original proofs without fully "comprehending or understanding the meaning and import of the same," and that the statement was based on rumors and current talk among citizens. It was contended that by reason of such proofs the court should have granted defendant's motion to abate the action and a subsequent motion for a nonsuit. *Held:*

(1) Such proofs, at most, were mere *prima facie* evidence of the facts therein stated.

(2) The court did not err in refusing to abate the action or to grant a nonsuit.

3. A second proof of death does not nullify a prior proof returned by the company, but such proofs are to be taken together, as supplying each other's defects, and if, combined, they answer the requirements of the policy, the law is satisfied.

4. In an action on a benefit certificate the sole defense was suicide. The jury returned a verdict that the insured's death was not "caused by suicide, whether sane or insane." Error was assigned because the court refused to set aside the verdict and grant a new trial. *Held*, that the verdict was sustained by the evidence stated in the opinion.

5. In an action on a benefit certificate where the only defense was suicide of the member, the court correctly instructed the jury as to the burden of proof, that the presumption of law was against the commission of suicide, and that defendant must overcome this presumption by a preponderance of evidence. The proofs of death and amendments thereto did not deny the fact of suicide nor withdraw a statement of suicide made in the original proofs, and the defendant requested no instructions as to the proofs of death being considered as evidence in the case. *Held* that, the determination of the question whether the deceased intentionally killed himself being for the jury under the instructions of the court, any presumption of suicide arising from the proofs of death was not stronger than the general presumption against suicide, and did not shift the burden of proof.

6. In an action on a benefit certificate where the defense was suicide, a certified copy of the certificate of death made by the health officer, who was also a witness for the plaintiff, was offered, not by way of impeachment, but as original testimony, and was *held* incompetent.

7. In an action on a benefit certificate where the defense was suicide, it is competent to show that the deceased was short in his accounts with a church, but testimony of a trustee that he had made partial inquiries among members of the church and found that certain of them claimed to have made payments to the deceased and taken receipts therefor is mere hearsay.

8. In such case the receipts themselves are the best evidence.

APPEAL from a judgment of the circuit court for Winnebago county: GEO. W. BURNELL, Circuit Judge. *Affirmed.*

This action was commenced August 17, 1905, upon a benefit certificate issued by the defendant August 15, 1902, upon the life of the plaintiff's husband, William Rohloff, and payable to her, which certificate, among other things, contained the following provisions:

"This is to certify that in pursuance of the articles of incorporation and by-laws of this association, and in consideration of the statements contained in his application No. 392 and the benefits and conditions *on the back hereof,* all of which are hereby made a part of this contract, Mr. William Rohloff . . . has been admitted to membership in this association."

And from the back thereof this:

"In case of the death of the member by suicide, whether sane or insane, voluntary or involuntary, at the time, the entire and only liability under this contract shall be the amount of benefit assessments paid to the association by the member, as shown by the records of this association, and the same shall be received by the beneficiary in full settlement of this contract."

It is conceded that the policy was in full force at the time of the death of the insured.

The complaint alleges, in effect, that the said William Rohloff died January 15, 1905; that the plaintiff was his wife; that she had fully performed all the conditions of said policy by her and her husband to be performed; that notice and proof of death were given to the defendant January 21, 1905, and subsequently errors therein were corrected by

amendments; that $2,149.14 and interest thereon from April 21, 1905, was due and payable on the policy; and that the defendant refused to pay the same. The defendant answered by way of admissions, denials, and counter allegations, setting forth the by-laws of the defendant and the provisions of the policy above quoted, and, after admitting the death of the insured, alleges that he "came to his death and died by his own act and by suicide, as the plaintiff then and ever since has well known, . . . as she stated in the proof of loss and death by her submitted to this defendant and in her complaint referred to," in which she stated on oath that "said William Rohloff was killed on January 15, 1905, by shooting himself in the heart, according to the verdict of coroner's jury;" and also alleges the tender back to the plaintiff of the amount of benefit assessments paid thereon of $49.14, but which the plaintiff refused to accept.

Before a jury was called the defendant, on presentation to the court of the articles of incorporation, the proofs of death as mentioned, the subsequent amendment of the same, and the provisions of the policy above quoted, moved to abate the action, whereupon the court ruled: "The court is of the opinion that the plea in abatement, *if there is one,* must be overruled." Thereupon a jury was impaneled and the cause was tried, and at the close of the trial the jury returned a special verdict to the effect that "the death of the said William Rohloff" was not "caused by suicide, whether sane or insane." Thereupon the court ordered judgment in accordance with the prayer of the complaint. From the judgment entered thereon accordingly, with costs, the defendant appeals.

John Bottensek, of counsel, for the appellant.

For the respondent there was a brief by *Pierce & Lehr,* and oral argument by *J. E. Lehr.*

CASSODAY, C. J. 1. Error is assigned because the court refused to abate the action. This is based upon the ground

that the amendment to the proofs of death was received by the defendant less than ninety days prior to the commencement of the action. The original proofs of death had, however, been received by the defendant nearly seven months prior to the commencement of the action. Certainly every amendment to the proofs of death should not operate as an extension of the time of payment or the commencement of the action. The original proofs of death contained a statement in a physician's affidavit in answer to a question as to the direct cause of death: "Gunshot wound in heart. Case of suicide," and also a statement of the plaintiff that the insured "was killed on January 15, 1905, by shooting himself in the heart, according to verdict of coroner's jury." The circumstances under which the body was found preclude any personal knowledge on the part of the plaintiff as to the manner in which he came to his death. The amendment was to the effect that the plaintiff made such original proofs without fully "comprehending or understanding the meaning and import of the same," and that the statement above quoted was based upon rumors and current talk among citizens. It has been held in New York and sanctioned by text-writers that a second proof of loss does not nullify a prior proof returned by the company, but that such proofs are to be taken together, as supplying each other's defects, and if, combined, they answer the requirements of the policy, the law is satisfied. *Brown v. Hartford F. Ins. Co.* 52 Hun, 260, 5 N. Y. Supp. 230; 2 May, Ins. (4th ed.) § 460. See, also, 19 Am. & Eng. Ency. of Law (2d ed.) 103.

2. Counsel also contends that by reason of such proofs of loss the court should have granted the defendant's motion for a nonsuit. Such proofs, at most, were mere *prima facie* evidence of the facts therein stated. This court held long ago, in an opinion by Chief Justice RYAN:

"While the Code allows defenses in abatement and bar to be pleaded in one answer, it does not permit the same de-

fense to be pleaded in abatement and in bar, and where that is done the plea in abatement is a nullity." *Hooker v. Greene,* 50 Wis. 271, 6 N. W. 816.

Upon the authority of that case it was subsequently held by this court:

"While a right to plead in abatement may be waived by pleading to the merits, yet it does not follow that a plea to the merits is to be deemed waived or withdrawn by subsequently filing a plea in abatement. Dilatory pleas are not favored in the law, whereas pleas in bar and to the merits are favored." *Baker v. State,* 88 Wis. 140, 148; 59 N. W. 570. See *Crowns v. Forest L. Co.* 99 Wis. 103, 105, 74 N. W. 546.

There was no error in refusing to grant a nonsuit or to dismiss the action.

3. Error is assigned because the court refused to set aside the verdict and grant a new trial. The claim is that there is no evidence in the record to support the verdict. That verdict is to the effect that the death of the deceased was not caused by suicide, whether sane or insane. That was the only question submitted to the jury. As frankly stated in the brief of counsel for the defendant: "The defense set up was suicide of the insured." That is the only defense on the merits alleged in the answer. The question whether the deceased came to his death in some other way than by suicide was not in issue and not determined. The finding is, in effect, that the deceased did not intentionally or designedly destroy his own life. The evidence as to the circumstances under which the body was found are undisputed. The death occurred on Sunday, January 15, 1905. The deceased was the street commissioner of the city of Appleton. On the evening before the death he was at his office in the basement of the city hall and gave directions to those under him for the work of the then coming week. In the forenoon of the fatal day, at his home and in the presence of his wife and children, he was engaged in cleaning a revolver. On objec-

tion being made, he put the revolver in its usual place in his wife's dresser. He was financial secretary of St. Paul's Lutheran church, and as such was to be present at a meeting of the trustees of the church at 2 o'clock that afternoon. Shortly after the noon hour he left his home with the church book, telling his family that he was going to a church meeting that afternoon. After he left, his wife saw nothing of the revolver, but knew it was gone. She saw nothing more of him that day. When he failed to attend the church meeting the witness Dittman was requested to look him up. He went to a saloon, and, not finding him there, telephoned his wife as to his whereabouts, and was informed by her that he had gone to the church meeting. Dittman then went to the office of the deceased, but failed to find him there. He then went to the rear door of Hinton's saloon, where he found the deceased, and asked him if he did not know he was to be at the church meeting, and the deceased said "Yes," and took out his watch, and said it was half past 2, and he would be there in a minute. Dittman then told him that he would telephone his wife that he had found him, and did so. The deceased then left the saloon with the church book, but did not go to the church meeting. About 6 o'clock in the evening the brother of the deceased, John, was called up by the plaintiff by telephone, and told that the deceased was not at the church meeting, and asked whether he had seen him, and requested John to make search for her husband. About 7 o'clock in the evening John and an employee under the deceased went in search for him. Finally they went to the city hall, found the outside basement door locked, then, after obtaining a key at the police station, unlocked the outside door, and then unlocked the door to the tool room, adjoining the office of the deceased, with a wooden partition between them, having an opening along the top, called "airholes" in the testimony. They then got some boxes, lighted a match and the lantern, and looked over the partition through the "air-

holes," and saw the deceased lying on the lounge without a back to it, with his head toward the south. John then crawled over the partition, through the "airhole," and so into the office. The door of the office was locked, and there was no key in the door. He tried to find the keys to the office door in deceased's pants pocket, but failed. Then they tried to break the door in, but could not do so. John then made another effort to find the keys, and finally found them in the right-side coat pocket of the deceased, and unlocked the door, and people came in. When they first saw him on the lounge a revolver was on the floor by the side of the lounge and about eighteen inches from the knee of the deceased, who was lying flat on his back with his head inclined to the east and his hand on his stomach. One leg was straight and one hung over a little. His eyes were closed. He appeared to be asleep. There were three windows to the office, and they extended down below the surface of the ground and within three feet of the floor. There was a handle on the inside of the sash to raise the windows. The curtains on the windows were pulled clear down. The clothing of the deceased lay smooth and not ruffled. The overcoat of the deceased was found hanging on a nail in his office, and his hat was also hanging on a nail. Everything in his office was in order. One of the books of the St. Paul's church was in the office at the time. The deceased was right-handed, and his right side was toward the wall, and the revolver was on the floor on the left of the body. The revolver was picked up by Policeman Baker soon after the body was found, and by him turned over to the chief of police soon after, and on examination the chief of police found that there were two empty shells in the revolver and three loaded ones. There was no evidence of powder marks on his clothing. On reaching the office and finding the dead man Policeman Baker telephoned Dr. Ellsworth the fact and requested him to come to the office immediately, and he did, and got there a little after 9 o'clock, and found three bullet holes through the shirt of the deceased, as

he was lying on the sofa with his ordinary clothes on, overcoat and hat removed. His coat was on, and his vest was open full length, unbuttoned. His shirt, pants, and shoes were all on. The opening in the vest was sufficient to enable him to see two openings, as deceased lay there on the lounge, one just above the left nipple, another about in the median line, and after the removal of the vest he found another opening nearly over the collar bone. After opening up the clothing of the deceased the doctor found one bullet hole about an inch above the left nipple on the left side of the breast, being the point of entrance, and it pointed from the left to the right at about an angle of forty-five degrees, taking a course toward the heart and presumed to enter the heart; another just about the median line, the middle of the breast bone, being the point of entrance; and another out over the collar bone, being the point of exit, because it was larger.

It was Dr. Ellsworth's affidavit that was contained in the proofs of loss; and, on being questioned in relation to the statement there made, he testified to the effect that at the coroner's inquest the questions and answers all tended towards suicide; that he did not know whether it was suicide or not, but such was the presumption indulged from start to finish; that in answer to a hypothetical question based upon the facts stated he answered that in his opinion it was impossible for the deceased to have shot himself. In answer to another question he said perhaps it was possible, but it was a questionable case; that, as he stated before the coroner's inquest, it was never done with the right hand, and if done at all it was done with the left hand.

The physical facts, of which the foregoing is a general outline, are undisputed. The whereabouts and conduct of the deceased from about half past 2 o'clock on that Sunday afternoon to the time his body was found in the evening are wholly unaccounted for and left to conjecture. Can it be said, as a matter of law, that the inferences or conclusions to be drawn from such facts and circumstances are so clear

and unambiguous that reasonable men, unaffected by bias or prejudice, would agree that the deceased intentionally shot himself? If that is not so, the verdict of the jury is sustained by the evidence, and the trial court properly refused to set it aside and grant a new trial. The law on that subject has so often and so recently been declared by this court as not to require repetition here. *Tiborsky v. C., M. & St. P. R. Co.* 124 Wis. 243, 246, 247, 102 N. W. 549, and cases there cited; *Roedler v. C., M. & St. P. R. Co.* 129 Wis. 270, 109 N. W. 88, 91; *Kaples v. Orth,* 61 Wis. 531, 533, 535, 21 N. W. 633. In support of the verdict the evidence is, of course, to be considered in the most favorable light it will legitimately bear. Id. The facts in the case are very different from those in cases relied upon by counsel. *Agen v. Metropolitan L. Ins. Co.* 105 Wis. 217, 80 N. W. 1020; *Hart v. Fraternal Alliance,* 108 Wis. 490, 84 N. W. 851; *Voelkel v. Supreme Tent K. M. W.* 116 Wis. 202, 92 N. W. 1104. We must hold that the verdict is sustained by the evidence.

4. In charging the jury upon the question whether the deceased intentionally killed himself the court said:

"The burden of proof is upon the defendant to establish by a fair preponderance of the evidence that the cause of death was suicide. . . . As applied to the facts in this case, it devolved upon the defendant to satisfy you by a preponderance of the evidence that the cause of death was suicide. It does not devolve upon the plaintiff to prove a negative—that is, to prove that it was not suicide,—but the burden of proving it is on the defendant."

And again the court said to the jury:

The "presumption of law is against the commission of suicide, and the defendant must first overcome this presumption in law against suicide, and establish the fact of suicide by a preponderance of evidence, and in the absence of such proof you must answer the question submitted to you by 'No;' . . . but this presumption may be rebutted by proof, and . . . the burden is on the defendant to rebut that presumption and satisfy you by the evidence that the cause of death was suicide."

Counsel for the defendant admits the correctness of such portions of the charge as propositions of law. They are certainly in harmony with the rulings of this court. *Agen v. Metropolitan L. Ins. Co., supra; Hart v. Fraternal Alliance, supra; Voelkel v. Supreme Tent K. M. W., supra.* But counsel contend that as neither the original proofs of death nor the amendments thereof made nearly six months afterwards denied the fact of suicide, nor withdrew the statement of suicide therein made, the presumption of suicide arising therefrom was "stronger than the other general presumption against suicide," and hence shifted the burden of proof from the defendant to the plaintiff. Such proofs were at most *prima facie* evidence of the facts therein stated to be considered by the jury, but that did not require the court to take from the jury the presumption against suicide. Id. The defendant requested no instruction as to the proofs of death being considered as evidence in the case. The determination of the question whether the deceased intentionally killed himself was for the jury under instructions of the court.

5. We perceive no error in excluding from the consideration of the jury a certified copy of the certificate of the death of the deceased, made by the witness Dr. Ellsworth and health officer, and filed in the register's office as required by secs. 1024, 1024*a*, Stats. 1898. It was not the best evidence and was not offered by way of impeachment, but as original testimony, and was clearly incompetent.

6. The defendant claims that the court improperly excluded testimony as to the amount of money collected by the deceased as financial secretary of the church and his arrears for moneys so collected. In excluding such testimony the court ruled that it was competent for the defendant to show that the deceased was short in his accounts with the church, but that the defendant could not prove by a trustee that he had made partial inquiries among members of the church and found that certain of them claimed to have made payments to the deceased and taken receipts therefor, because the

receipts themselves, which were not produced in court, were the best evidence. Obviously the testimony offered was mere hearsay. We find no error in such ruling.

By the Court.—The judgment of the circuit court is affirmed.

SCHEUER, Respondent, vs. CHLOUPEK, Appellant.

November 8—December 4, 1906.

Reformation of instruments: Mutual mistake: Pleading: Amendments: Discretion: Dower: Merger.

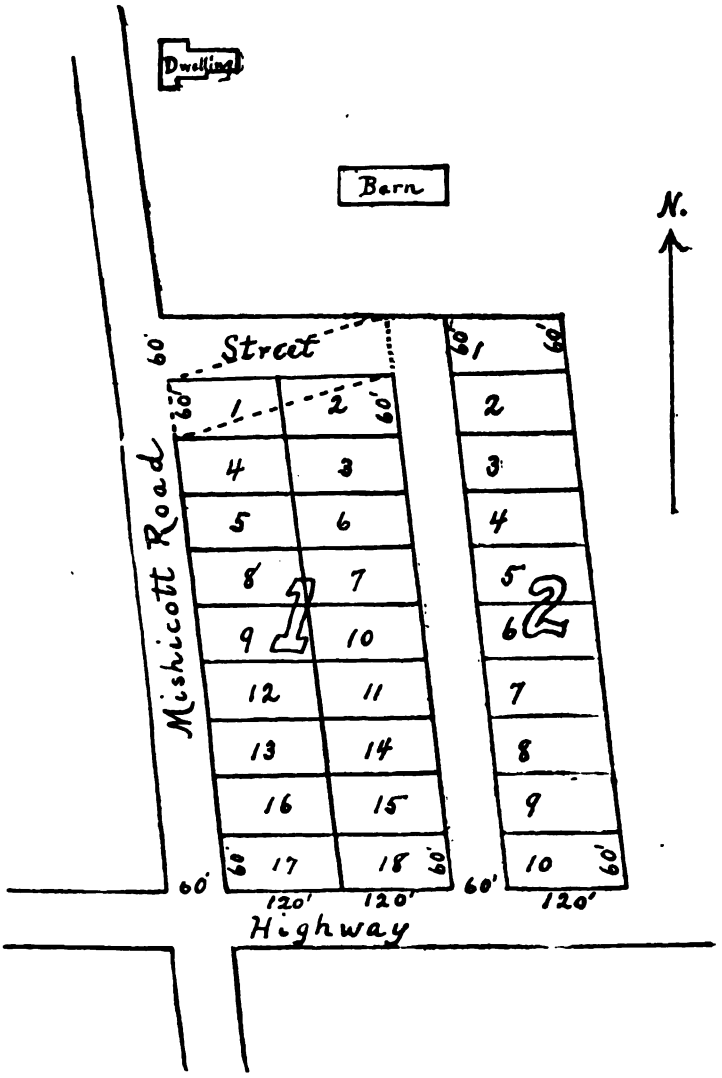
1. In an action to reform a deed the evidence, stated in the opinion, is *held* to justify a finding that a mutual mistake was made as to the identity of the tract of land described in the deed, and that the deed should be reformed so as to include that pointed out and supposed to be conveyed.
2. In an action to reform a deed the fact that the land was a homestead occupied by the grantor and his wife was not pleaded. On the trial testimony tending to show such fact was received subject to objection as to its competency, relevancy, and admissibility under the pleadings. No application to amend the answer was made until after the evidence had been closed and the facts argued, and was first requested nearly three months thereafter in defendant's brief. *Held*, under the circumstances shown in the record, that there was no abuse of discretion in refusing leave to amend.
3. In an action against the grantor and his wife to reform a deed the grantor died pending an appeal. After judgment and prior to his death the grantor conveyed all his title and interest in the land affected to his wife. It was contended, on appeal, that the wife had only signed the deed in that capacity, that she had received no consideration therefor, and that the law would not reform the deed so as to bar her dower in land which she had never conveyed nor agreed to convey, and for which she had received no part of the consideration. *Held* insufficient, since the record showed (1) there was neither pleading nor proof that the wife had received no part of the consideration; (2) that by accepting the deed of the fee the wife's inchoate estate in dower was merged in the fee.

APPEAL from a judgment of the circuit court for Manitowoc county: MICHAEL KIRWAN, Circuit Judge. *Affirmed.*

This is an action in equity to reform the description of land in a warranty deed executed by Adolph Chloupek and *Anna Chloupek,* his wife, to the plaintiff December 26, 1895. The land in question is situated in Manitowoc county near the village of Mishicott, and is part of a tract of thirty-eight acres which, on and prior to August 8, 1895, was owned by Adolph Chloupek. On the day last named he caused a portion of it to be surveyed and stakes to be driven to mark the corners of lots, blocks, and streets according to a plat thereafter to be made. On the following page is a copy of the plat afterwards made by the surveyor, except that the dotted lines do not appear upon the plat.

The idea at first was to have twenty or twenty-two sixty-foot lots in block 1, and measurements were made and stakes driven accordingly, but it was finally decided to have but eighteen lots and a sixty-foot street, because of the close proximity of Mr. Chloupek's barn, but the stakes already driven on the extreme north were left standing. The plat was acknowledged by Mr. Chloupek August 19, 1895, but was not recorded until October 21st of the same year. The land was farm land when platted and the streets marked on the plat were not opened after the plat was made. The streets on the west and south sides were highways already in existence. Some time in the latter part of August or early in September the plaintiff and Adolph Chloupek had some negotiations looking towards the purchase by the plaintiff of two lots. The plaintiff claims that he was not shown the plat, but that Chloupek went with him to the premises, and, as the north corner lots of block 1 were held at a higher price, he concluded to take the next lots, and that Chloupek then pointed out to him the stakes which he said were the corner stakes of lots 3 and 4, and they agreed on the price and closed the oral bargain for the parcel so pointed out, which both sup-

posed constituted lots 3 and 4. Chloupek denies that he was ever on the ground or pointed out any stakes to the plaintiff,



and claims that he showed him the plat and talked with him about the lots simply from examination of the plat, and the

plaintiff finally concluded to take lots 3 and 4. The premises which the plaintiff claims that Chloupek thus pointed out to him constitute the parcel inclosed with dotted lines on the map. The evidence shows that plaintiff immediately took possession of the parcel inclosed in dotted lines and commenced to build a house thereon, which was finished about Christmas time, when the plaintiff moved in and received from Chloupek a deed of lots 3 and 4, which both parties then and for six years afterwards supposed to be the parcel included in dotted lines. The plaintiff built a fence around this parcel during the following spring and erected a barn, dug a well, and planted an orchard. When the oral bargain was made Chloupek had a barn on the thirty-eight acre tract immediately north of the plat and was also building a house. He then resided in a rented house a short distance away, but moved into the new house in November, 1895. In October, 1901, Chloupek sold and conveyed to one Hrudka lots 5 and 6 and the north half of lots 7 and 8 in the plat and put Hrudka in possession of a piece of ground ninety feet in width immediately south of the plaintiff's inclosure. At this time the mistake in the plaintiff's boundary lines was first discovered and negotiations were had for some settlement of the matter, which proved fruitless, and this action was commenced. The plaintiff claims that the description in his deed should be corrected so as to describe the land included within the dotted lines, on the ground that he actually bought that land and that, by mutual mistake, it was wrongly described in the deed as lots 3 and 4. Chloupek, however, claims that he sold lots 3 and 4, and that the only mistake was the mistake made by plaintiff himself in taking possession of the wrong land. There was no claim made in the answer that the premises in question constituted any part of Chloupek's homestead. The court found that a mutual mistake was made substantially as claimed by the plaintiff, and entered judgment reforming the deed so that it should describe the land

actually occupied by the plaintiff, and the defendants Chloupek and wife appealed.

It further appears by a stipulation filed in this court that Adolph Chloupek died after the appeal to this court and that, prior to his death, he duly conveyed to the defendant *Anna* all his title and interest in the land affected by this action; also that *Anna Chloupek* has been appointed administratrix of his estate and has duly qualified. It was further stipulated that the appeal should be prosecuted by *Anna Chloupek* in her individual capacity and as administratrix aforesaid.

For the appellant there was a brief by *Sedgwick, Sedgwick & Schmidt,* and oral argument by *G. G. Sedgwick.*

For the respondent there was a brief by *Nash & Nash,* and oral argument by *L. J. Nash.*

WINSLOW, J. We shall spend little time upon the questions of fact in the present case. Examination of the bill of exceptions satisfies us that the court was entirely justified in holding that it was clearly proven that a mutual mistake was made by Chloupek and the plaintiff at the time of the plaintiff's purchase, and that the tract actually pointed out to the plaintiff by Chloupek and supposed by both parties to be bought and described in the deed afterwards delivered was the tract included within the dotted lines in the plat.

There are two other questions in the case, however, which demand some consideration. The appellant claims that it is conclusively shown in the case that the property in question was a part of the homestead of Adolph Chloupek and *Anna Chloupek* at the time of the sale, and hence that equity will not reform the deed against the husband in his lifetime nor against his widow. If this fact does appear in the evidence and the evidence is properly in the case, it seems difficult to avoid the conclusion claimed. *Petesch v. Hambach,* 48 Wis. 443, 4 N. W. 565; *Conrad v. Schwamb,* 53 Wis. 372, 10 N. W. 395. The serious difficulty arises, however, upon the

question whether the evidence tending to show the fact of homestead was before the trial court for consideration. The fact that the premises constituted a part of the defendants' homestead is without doubt an affirmative defense and should be pleaded in order to be available. It was not pleaded, nor did the plaintiff's evidence show the fact. When the defendants took the case and attempted to introduce evidence tending to show that the whole tract was their homestead, prompt objection was made by the plaintiff on the ground that it was incompetent, immaterial, and inadmissible under the pleadings, and the court, in substance, ruled that it was inadmissible, but that he would receive it subject to the objection, and it was distinctly stated that all evidence tending to show homestead was only to be received subject to objection. No application was made to amend the answer, but evidence was introduced showing that, at the time of the oral arrangement for the sale, Chloupek was keeping his stock in the barn on the premises north of the platted portion; that he was then living in a rented house near by; that he was building a house on the premises, and intended to occupy them as his homestead as soon as the house was finished; and that he moved into the house in November following, and afterwards occupied the whole premises as his homestead, including the platted portion and excepting the part occupied by the plaintiff. The evidence was closed and the facts argued June 27, 1903, but no application was made to amend the answer. In September and October following, written briefs were served and filed, and in the defendants' brief, served September 17th, there was for the first time a request that the defendants' answer be amended so as to admit the evidence if the court deemed such amendment necessary. The trial court held that in view of the fact that the plaintiff, through no fault of his own, had expended some $1,800 on the premises and would be deprived of his home as he had prepared it and relegated to an action for damages against the husband in case

the amendment were to be permitted, no amendment would be allowed at that late day because it would not be in furtherance of justice. The question here is whether it is our duty to reverse the ruling of the trial court and consider the evidence; in other words, whether the ruling was an abuse of discretion.

The whole principle of the Code undoubtedly is that amendments should be allowed liberally, that substantial rights should not be lost on account of mere failure to plead in apt terms or within the time limited by statute, if the substantial rights of the opposing party can be preserved. We should have been better pleased had the amendment been allowed and the question whether a homestead right existed determined. However, the specific objection had been promptly made early in the trial and the court had at once made a ruling showing that in his judgment an amendment was imperative. The defendants chose to stand on their pleading through the entire trial and for months after the trial had been concluded. Furthermore, it appears that the defendants made a proposition of settlement by way of exchange of lots and removal of buildings and payment by plaintiff of $100, in their answer and at the opening of the trial, which the plaintiff refused to accept. It seems likely that this refusal was based partly on the failure to plead the defense of homestead. Had the defendants made their application to amend when the objection was first made and they were notified that amendment was necessary, it may well be that the plaintiff would have accepted the offer and spared himself the expense of further trial of the case. Such considerations as these in addition to those named by the trial judge induce us to hold, with some reluctance, that there was no abuse of discretion in refusing to allow the amendment.

Another contention is made to the effect that it appears that *Mrs. Chloupek* only signed the deed as the wife of Adolph, that she received no consideration therefor, and that

the law will not reform a deed so as to bar her dower in land which she has never conveyed nor agreed to convey, and for which she has received no part of the consideration. There are at least two difficulties with this proposition: *First,* there is neither pleading nor proof that *Mrs. Chloupek* received no part of the consideration, and the only evidence bearing on the subject is the recital in the deed, which acknowledges that the parties of the first part (Mr. and *Mrs. Chloupek*) have received the sum of $175, in consideration of which they execute the deed; *second,* it appears by the stipulation filed that Mr. Chloupek, before his death and after judgment, deeded the fee in the land in question to the defendant *Anna.* By accepting a deed of the fee *Anna's* inchoate estate in dower was unquestionably merged in the fee. The greater and the lesser estate met in the same person with no intermediate estate between, and the lesser estate ceased to exist. *Youmans v. Wagener,* 30 S. C. 302, 3 L. R. A. 447, 9 S. E. 106. The defendant now has only the fee, which is subject to the plaintiff's right of reformation of his deed.

By the Court.—Judgment affirmed.

NOLAN, Administrator, Appellant, vs. KROENING, Respondent.

November 8—December 4, 1906.

Appeal and error: Assignments of error, when not considered: Conclusiveness of verdict: Animals: Personal injuries: Evidence: Instructions to jury: New trial: Misconduct of jurors.

1. **Error assigned respecting the reception and rejection of evidence, not claimed to relate to findings of the jury questioned, not considered.**
2. **If there is any credible evidence to support a verdict it cannot be disturbed on appeal.**

3. In determining whether there is such credible evidence or not the record should be viewed in the most favorable light it will reasonably bear in support of the verdict, and the conclusion of the trial judge thereon will not be disturbed unless clearly wrong.
4. In such case it is not sufficient that there is room for the trial judge to have reached, or that the supreme court might have reached, a different conclusion.
5. In an action for personal injuries to a traveler on a highway in consequence of his horse becoming unmanageable by being frightened by a dog, under the evidence, stated in the opinion, it was *held* that a verdict for defendant could not be disturbed in view of the fact that the trial judge, both in submitting the cause to the jury and in deciding a motion to set aside the verdict, deliberately decided it was within reasonable probability that the horse was not frightened or made unmanageable by defendant's dog.
6. In such case instructions to the jury, stated in the opinion, are *held* to be free from error.
7. Findings made on a motion for a new trial, that jurors were not guilty of misconduct, must stand unless they appear to be against the clear preponderance of the evidence.

APPEAL from a judgment of the circuit court for Manitowoc county: MICHAEL KIRWAN, Circuit Judge. *Affirmed.*

Action to recover upon two causes of action as hereafter indicated.

The first claim of the plaintiff was that on September 16, 1902, while G. O. Krueger, the deceased, was traveling south on Sixth street in the village of Reedsville, Manitowoc county, Wisconsin, riding in an open buggy accompanied by his wife, he driving a single quiet horse hitched to such buggy, a dog owned by the defendant, of bad disposition and accustomed to pursue, bite, and worry horses driven upon highways, savagely attacked such horse, worried, pursued, and bit it, causing the horse to become frightened and unmanageable and to jump violently to one side and run along the road, the dog following and continuing its attack on the horse, for a distance of some forty rods, whereby said Krueger was violently thrown from the buggy and one of his feet was caught in the foot-rest holding it fast so that he was dragged for the

distance aforesaid, injuring him so that he died; that he was an able-bodied man sixty-seven years of age, having a wife and family, and was capable of earning $600 per year. Compensation for damages to the surviving relatives in the sum of $5,000 was demanded.

The second cause of action was for compensation for damages to the deceased and was based on facts as to the injury to him stated in the first cause of action.

All allegations of the complaint were put in issue by the answer.

Before the commencement of the trial the jury were carefully cautioned against talking about the case with outsiders or with one another pending the submission of the cause to them for a verdict and, generally, as regards their duty as jurors in respect to keeping free from all impressions other than those produced by the evidence and the law given in court.

The evidence was undisputed that on the day alleged in the complaint, while Mr. Krueger was driving his horse on the highway, as alleged in the complaint, the defendant approached him from behind, riding in a cart drawn by a single horse and accompanied by a boy; that his dog was following him; that he passed the deceased and subsequently that the latter passed him, the deceased's horse being in an unmanageable condition, and that he was thrown from his buggy and came to his death substantially as alleged in the complaint. Whether the defendant's dog was instrumental in producing such result and whether Mrs. Krueger negligently contributed thereto by taking hold of one of the lines and pulling the horse to one side, were controverted matters. The evidence showed that Mr. Krueger's horse became unmanageable about the time *Mr. Kroening* passed Krueger and that the latter's horse jumped to the right and into a ditch at a small culvert, at which time he was thrown from his buggy and thereafter dragged as stated in the complaint. The court

submitted the cause to the jury for special verdict with the following result (matters submitted and not answered, or rendered unnecessary on account of questions that were answered, are omitted):

"1. On September 16, 1902, was the defendant, *Reinhardt Kroening,* the owner and keeper of the dog mentioned in the complaint in this action? *A.* (by the court by consent of counsel). Defendant was the keeper of said dog.

"2. At the time and place of the injury in question, did said dog attack, bite, and frighten, in the public highway, the horse which plaintiff's intestate, Godfried O. Krueger, was then and there driving? *A.* (a) The dog did not attack or frighten the horse. (b) The dog did not bite the horse."

"6. At the time in question, was the horse which said Krueger was driving so untrained, or so vicious or unmanageable in disposition, that it was not a reasonably safe animal to be driven to a buggy by said Krueger on the public highway? *A.* No, not safe.

"7. Did any want of ordinary care on the part of said Krueger or his wife contribute to produce his death? (64 Wis. 323.) *A.* Yes."

After verdict there was a motion to set the same aside because of misconduct on the part of the jury and there were other motions, rulings, and exceptions thereto preserving for review the questions discussed in the opinion. Judgment was rendered on the verdict in favor of the defendant and the plaintiff appealed.

For the appellant there was a brief by *Sedgwick, Sedgwick & Schmidt* and *Healy & Joyce,* and oral argument by *G. G. Sedgwick.*

For the respondent there was a brief by *Nash & Nash,* and oral argument by *L. J. Nash.*

MARSHALL, J. At the threshold of this case stands the finding of the jury that the respondent's dog "did not attack or frighten the horse;" "that the dog did not bite the horse."

If that has support in the evidence it, of course, disposes of the case in respondent's favor, leaving no ground for a new trial unless such ground exists in the instructions of the court or the ruling on the motion to set the verdict aside for misconduct of the jury. Errors are assigned respecting rulings as to the reception and rejection of evidence, but, so far as we can see, as claimed by respondent's counsel, they do not relate to the finding in question, so we will first devote our attention to the question of whether it is contrary to the evidence.

The rule has been too often stated to leave necessity for more than a reference to it, that if there is any credible evidence to support a verdict it cannot be disturbed on appeal; that in determining whether there is such credible evidence or not the record should be viewed in the most favorable light it will reasonably bear in support of such verdict, and that in deference to the conclusion of the trial judge in respect to the matter,—who saw all the witnesses and heard their testimony, and from his superior point of view must be presumed to have had much better opportunity for determining the truth than the appellate court can have,—such conclusion should not be disturbed unless it appears to be clearly wrong. The mere fact that there was room, as appears by the record, for the trial judge to have reached a different conclusion or is room for us to reach one looking alone at the printed pages presented, not regarding the superior opportunities of the trial judge as stated, is not sufficient. *Powell v. Ashland I. & S. Co.* 98 Wis. 35, 73 N. W. 573; *Maanum v. Madison,* 104 Wis. 272, 80 N. W. 591; *McCune v. Badger,* 126 Wis. 186, 105 N. W. 667. That doctrine is one of the most important guides in the exercise of appellate jurisdiction as to matters of fact. Often the appearance of a witness upon the stand while giving his testimony, the manner of his answering the interrogatories, and other things occurring under the vigilant eye of the trial judge, are legitimately the controlling

elements in regard to whether there are reasonable conflicting inferences arising from the testimony requiring the cause to be submitted to the jury. Therefore reasonable doubts arising from the printed record of a trial when viewed by itself should be solved in favor of the trial court's decision. No other course would accord to such judge the legitimate dignity of his position or could be adopted without serious danger of wrong prevailing over right, because of those persuasive elements legitimately pointing the way to justice in the matter presented to his view but not presentable to an appellate court, being not given their proper weight.

The record before us as to the jury's answer to question number two must be tested by the foregoing. We shall not attempt to quote the evidence in respect to the matter in detail. It will be sufficient in the main, it seems, to state the general effect thereof.

Mrs. Krueger testified substantially in accordance with the allegations of the complaint as to the conduct of the dog; that she and her husband were riding in a buggy drawn by a single horse proceeding south and east on the highway, her husband driving the horse and she sitting on the left-hand side of the seat; that *Kroening* approached from behind them driving a horse drawing a cart in which he was riding; that his horse was going at a very rapid pace; that her husband turned to the left to allow him to pass, which he did; that when he was about twelve feet away, in passing, his dog growled, approached Mr. Krueger's horse on the left side, and bit the horse in the left hind foot above the ankle; that the dog growled low and ran along the side of the horse for some forty rods; that as the horse was bitten he became frightened and jumped and ran to the right and off the side of the road at a culvert into a ditch and thence on for a considerable distance wholly unmanageable; that when he jumped and ran off into the ditch Mr. Krueger tried to hold him and was thrown from the buggy, his foot being caught and held fast therein so that he was dragged and killed, as

stated in the complaint; that the horse ran along the side of the road in the ditch wholly unmanageable for the distance before stated and turned into the traveled way at what was called the "south culvert," when he became more quiet and proceeded on a short distance and was then stopped; that the dog followed tearing along on the east or left-hand side of the horse to the "south culvert;" that soon after the horse became unmanageable *Mr. Kroening,* who was ahead, turned aside, and that she and her husband and the unmanageable horse passed by him.

Mrs. William Bratz, who was working in the field just inside the fence where the accident happened, saw *Mr. Kroening* as he approached and passed Mr. Krueger. She said the dog was behind *Kroening's* cart as he approached Krueger's rig; that the former drove slowly as he approached but quickened his pace a little as he passed Krueger; that though she saw the dog she did not observe that he was excited or that he did anything to Krueger's horse; that she did not see him spring in any way or bark; that when the horse jumped she did not see the dog anywhere; that she saw the dog between *Kroening's* cart wheels, and then she saw him after *Kroening* passed Krueger between the two buggies; that she last saw the dog after the horse made the first jump and that some weeds interfered with her line of sight.

Mr. F. O. Kiehl, a witness called for the plaintiff, said substantially: I saw the horse shortly before it turned up into the highway where it slackened its pace. I saw a dog in the road but could not say it was *Kroening's.* The dog was on the left side of the rig in the center of the road. I could not say whether it was *Kroening's* or Frank Rusch's dog. Afterwards when *Mr. Kroening* came up his dog was with him, but I could not say it was the same dog I saw in the road. When I first saw the horse it was running on the side of the road. It trotted after it turned up into the road at the "south culvert." I did not see the dog do anything.

The examination of *Mr. Kroening,* taken under sec. 4096,

Stats. 1898, was offered in evidence. It was to this effect: I drove up behind Mr. Krueger on the occasion in question. I had a dark-colored yellow dog following me. As I approached Mr. Krueger he turned out to let me pass by. I did not see the dog after I came up behind Krueger till I passed by the culvert. As I passed by Krueger his horse jumped and I said, "Hold your horse!" After I had gone a short distance ahead of Krueger I heard some one crying and yelling and I looked behind and saw Krueger's horse coming after me and the man was down dragging under the buggy. I did not see the dog. I looked at the horse. I did not hear the dog. If the dog was there it would have struck my eyes. I would not swear there was no dog there. I didn't think of the dog. I did not see it at any time during the occurrence. I paid no attention whether there was any dog there or not. I don't know whether there was a dog following me or not. I know the dog was with me before I approached Mr. Krueger. I didn't see what started the horse.

There was evidence to the effect that after the accident a small scratch was found on the left hind leg of the horse near the ankle from which a little blood had flowed.

Julia Zahn, a witness called by the plaintiff, was with Mrs. Bratz at the time of the occurrence. She saw the horse at the instant Krueger fell out of the buggy and when it ran off into the ditch at the culvert. She did not see the dog or hear it bark.

Abraham Beck, called by respondent, said, in substance: I saw a dog following *Kroening's* rig at the time he passed Mr. Krueger. I was in the field with Mrs. Bratz and Julia Zahn. I saw *Mr. Kroening* pass by Mr. Krueger. The latter's horse got a little high-lifed at that time. He tried to hold his horse. The horse raised up in front and Mrs. Krueger grabbed round with the right arm over the lines. That was just before the horse had to jump off the culvert. I did not see the dog or hear him bark. Some weeds interfered

with seeing. The horse jumped twice, and the second time he jumped he went into the ditch at the culvert. I did not see the dog after *Kroening* passed Krueger. As the horse jumped Mrs. Krueger reached over and got hold of the right-hand line.

Mrs. Beck, a witness called for the defendant, said: I saw the dog in the middle of the road before Krueger fell out of the wagon. I did not see him do anything to the horse, or hear him bark. I just saw him going along with the team in the road. I saw Mrs. Krueger at the time of the occurrence reach over and take one of the lines. That was as the horse jumped at the culvert.

There was evidence tending to prove that on one occasion Mrs. Krueger said she did not know respondent's dog bit the horse, but others said so, and evidence tending to prove that the dog on some occasions had pursued horses driven along the highway.

The foregoing shows sufficiently the general nature of the evidence. There was the direct and positive testimony of Mrs. Krueger that the dog bit the left hind foot of Krueger's horse, causing him to become unmanageable and go off into a ditch at the culvert and ultimately to cause Krueger's death. It was somewhat discredited by evidence that on a previous occasion she said the dog attacked the horse in front instead of by biting one of his hind feet, and further discredited by evidence tending to show that prior to the trial she said she did not know whether the dog bit the horse, but had been told so; and still further discredited by the circumstance that, whereas she said when respondent approached to pass by her husband's rig the former was driving very fast, the evidence generally in the case was to the contrary. All the witnesses on both sides, who testified to seeing the accident and seeing what occurred prior thereto and thereafter till the horse was stopped, and who were in a position where they probably might have seen or heard the dog if he attacked

or pursued the horse, as claimed, testified that they did not see any such thing.

Now it may be that Mrs. Krueger told the truth as to the cause of the horse going to the left and throwing Krueger into the position which produced his death, but in view of the evidence tending to impair her credibility, and the universal testimony of witnesses on both sides who were in a position where they might, within reasonable probability, have seen or heard the dog at some time during the occurrence, if its conduct was as Mrs. Krueger claimed, that they did not see any such conduct, and in view of the fact that the trial judge, who listened to all the evidence as it came from the mouths of the witnesses, both in submitting the cause to the jury, and in deciding the motion to set aside their finding, deliberately decided it was within reasonable probability that the horse was not frightened or made unmanageable by respondent's dog, we cannot, it seems, consistently with the rules governing such matters, disturb such decision. Whether the finding of the jury be right or wrong as an original matter, by those tests which it is our duty to apply thereto, it must stand as a verity in the case.

Notwithstanding the foregoing it is insisted on behalf of appellant that fatal error was committed in the instruction in respect to the second question. The language complained of can best be understood by reading it as a part of the entire charge in respect to such question, which is as follows:

"That second question reads, 'At the time and place of the injury in question did said dog attack, bite and frighten, in the public highway, the horse which plaintiff's intestate, Godfried O. Krueger, was then and there driving?' Your answer to this question will be divided into two parts. If you find that the dog did bite the horse which Mr. Krueger was driving, then your answer on that branch of the question will read, 'the dog did bite the horse.' If you find the horse was not bitten by the dog, then your answer to that part of the question will read, 'the dog did not bite the horse.' You will have no trouble in filling that out when you come

to look at the form that is given for the answer. The dog did bite the horse—the dog did not bite the horse. That is all there is of that. You will observe that one part of the question relates to the biting only, and the other part of the question relates to the inquiry whether the dog attacked and frightened the horse even if he did not bite it. If you find that the dog did attack the horse either by biting him, or by running out, or barking or growling at him, or chasing him in such manner as to indicate that the dog was trying to bite, injure or worry the horse, and if the horse was thereby frightened, then your answer to that branch of this question should be, the dog did attack and frighten the horse. If you find that the dog did not attack the horse by biting him, nor by running out, or barking or growling at him, or chasing the horse in the attempt to bite or injure or worry the horse, then your answer to that part of the question should be, the dog did not attack nor frighten the horse.

"The word 'frighten' in the sense in which it is used in this question has reference to fright of the horse resulting, if it did result, from an attack upon the horse by the dog in some of the ways that I have explained to you, and not to any fright resulting, if it did result, from the act of the dog in running along the highway without making any effort or attempt to bite, injure, or worry the horse. If the horse took fright merely because the dog ran past, or behind, or alongside, or in front of the horse, without attacking or worrying or biting the horse, or trying to do so, then in the sense intended by this question the horse was not frightened by any act or conduct of the dog to which this branch of the question has reference, and you are then to answer it accordingly in the negative as to that part of the question. The fright about which this question inquires is fright resulting from an attack by the dog—not to fright which was not caused by such attack. If there was no such attack, then there was no fright caused by the dog in the sense meant by this question. While the answer to the question is not in form 'yes' or 'no,' yet the answer will be the equivalent of 'yes' or 'no' when read in connection with the question. It will be either an affirmative or a negative answer in the sense which has been explained to you, and the instruction which has been given to you on the subject of the burden of proof is applicable to this question and to the answer which you may make to it."

It is argued that the words, "If you find that the dog did attack the horse either by biting him, or by running out, or barking or growling at him, or chasing him in such manner as to indicate that the dog was trying to bite, injure or worry the horse, and if the horse was thereby frightened, then your answer to that branch of the question should be, the dog did attack and frighten the horse," suggest that the finding could not be that the dog attacked the horse unless the jury found that it intended to bite and injure or worry the horse. We do not so understand the court's language. Counsel seem to have gathered the idea urged upon our attention by reading such language as if there was a comma after the words "or chasing him," so that those following, viz., "in such manner as to indicate that the dog was trying to bite, injure or worry the horse," would relate to each of the preceding alternatives, while the charge as actually given was not so punctuated, but was so pointed off as to make the words "in such manner as to indicate," etc., refer only to the words "or chasing him," as will be seen by reference to the whole charge as quoted. Therefore the jury must have understood that if the dog either bit the horse or ran out at it, or barked or growled at it, causing it to become frightened, they should answer that the dog did attack and frighten the horse.

It is contended that the language, "it will be either an affirmative or a negative answer in the sense which has been explained to you, and the instruction which has been given to you on the subject of the burden of proof is applicable to this question and to the answer which you may make to it," in connection with the preceding language, "if the horse took fright merely because the dog ran past, or behind, or alongside, or in front of the horse, without attacking, or worrying or biting the horse, or trying to do so, then in the sense intended by this question the horse was not frightened by any act or conduct of the dog," put the burden of proof upon the

plaintiff to prove that the dog not only did attack and frighten the horse, but that it was the intention of the dog so to do at the time. The learned counsel seem to have read the court's language as if the words "trying to do so" were tied to the preceding alternatives, conjunctively instead of, as the fact is, disjunctively. As we read the language complained of, the idea conveyed by it is that if the dog merely ran past, or alongside of, or in front of the horse and neither attacked, nor worried, nor bit it nor tried to do so, then the fright of the horse, within the meaning of the question, was not caused by the dog. To give the language the sense attributed thereto as a basis for the assignment of error it would need to be in this form: If the horse took fright merely because the dog ran past, or behind, or alongside, or in front of the horse, without attacking or worrying or biting the horse and intending to do so, etc.

The foregoing covers all the criticisms of the charge specially made in the brief of appellant's counsel, and after a careful study of it we do not discover any other which the learned counsel may probably have had in mind in presenting the six exceptions to as many portions of the court's language selected therefrom.

The motion for a new trial because of misconduct of jurors was based on charges that three of them frequented a hotel at intervals during the trial, two of whom boarded at such hotel; that they consorted there with respondent and persons actively interested in his behalf; that they talked about the case with him and such persons, accepted treats of beer and cigars of them, and heard talk about the case by such persons and others. In the whole there was no definite and certain evidence as to the jurors accepting treats as claimed. At best, the evidence was in much conflict on all branches of the charges. The jurors themselves were sworn and examined and severally denied that they accepted any favors by way of treats from respondent, or his friends, during the trial, or

talked with them about the case, or heard them say anything about it, and, generally, denied in detail all charges of misconduct. There was some support for their evidence in that of other witnesses. It does not seem best to extend this opinion to the length that would be required in order to give even a summary of all the evidence taken and considered by the court on this subject. It has been carefully studied both as printed in the case and summarized in the briefs of counsel, and also as appears in the bill of exceptions. In disposing of the matter here the rule must be applied which governs in deciding other assignments of error as to the conclusions of a trial court on matters of fact. The conclusion must stand, unless it appears to be against the clear preponderance of the evidence. That rule should be applied with considerable strictness on a motion of this sort, as has been heretofore suggested in opinions of this court. *Carthaus v. State,* 78 Wis. 560, 47 N. W. 629; *Cupps v. State,* 120 Wis. 504, 529, 97 N. W. 210, 98 N. W. 546. In the last case cited it was said, substantially: Evidence to impeach a verdict by attacking the fairness of a jury, to be effective, should be very clear and satisfactory. The court should not act upon it favorably to impeaching the verdict in the face of an unequivocal denial by the jurors, in the absence of the most clear and satisfactory evidence of the falsity of the denial. After verdict the interests at stake tempting an attack upon some particular juror are so great that all evidence in respect to such matters should be scrutinized with the greatest caution and care before passing judgment vacating such verdict. Applying that rule to the evidence in this case, and according to the trial judge's decision the dignity which it deserves, we are unable to say that the evidence to sustain the charges of misconduct is sufficiently clear and convincing to warrant a reversal of the judgment on that ground.

There are no other questions in the case that require special consideration in this opinion.

By the Court.—The judgment is affirmed.

SHEBOYGAN COUNTY, Respondent, vs. TOWN OF SHEBOYGAN FALLS, Appellant.

November 8—December 4, 1906.

Paupers: "Supported as a pauper:" Questions for jury.

1. Although one who is capable of earning a living and has some money may not be a pauper in fact, such facts are not conclusive against the possibility of having been supported as a pauper.
2. Under the expression "supported as a pauper," it is not only essential that aid should have been given by the poor authorities, but that such aid should have been applied to or received by the supposed pauper.
3. After a town had furnished support for B., a transient pauper, and had been reimbursed by the county, in an action by the county against the town in which B. had her legal residence the only question submitted to the jury was whether the town officers paid the money with the intention of aiding or supporting B. as a poor person. *Held*, that such question exhausted the issues only in case the evidence was undisputed that B. did receive the aid or some part thereof.
4. One, though living in the family and eating at the table of a pauper aided by the poor authorities, who pays his board, cannot be said to receive aid as a pauper merely because the landlord uses the money furnished by the poor authorities to purchase the food which the boarder eats.
5. In such case it makes no difference that the board is paid in services instead of money.
6. As a means of extending aid and support the poor authorities paid certain moneys to L. under an agreement that C. should take charge of the housework and care of L.'s children, thereby permitting L. to work out and earn the balance of the support needed for her family, which was done, and, in addition, C. paid certain moneys to L. for the purchase of necessaries for L.'s family. *Held*, that it could not be said, as a matter of law, that C. received as a pauper, and not merely as return for her own services and money, any portion of the aid furnished by the poor authorities, but that the question should have been submitted to the jury for their answer in the light of all the facts, circumstances, and reasonable inferences to be drawn therefrom.

APPEAL from a judgment of the circuit court for Sheboygan county: MICHAEL KIRWAN, Circuit Judge. *Reversed.*

Action for support furnished by the city of Plymouth be-

tween December 8, 1900, and November, 1903, to one Christina Bade, a pauper, claimed to have legal settlement in the defendant town. Prior to 1898 Christina Bade had made her home with her married son for a number of years in *Sheboygan Falls,* receiving no aid from the public, but being self-supporting and interested in some property in hands of her son, and undoubtedly had her legal settlement in that town. The son died in February, 1898, leaving a widow, Louisa Bade, and eight children. Christina had a small fund of money, something over $100, and worked out to some extent as a nurse. Before July 1, 1898, the family, including Christina, moved to the town of Plymouth, where they remained until about October, 1899, when they moved to the city of Plymouth. In November and December, 1898, the daughter-in-law applied for aid and received one instalment of firewood from the town of Plymouth and an allowance of money, first $6, and then $8, per month, from the town of *Sheboygan Falls.* The amount of that allowance was fixed after consultation with Louisa, upon the understanding that, if Christina would take charge of the housework and care of the children, she, Louisa, would be able to work out and earn the balance of the support needed by her family. This course was followed, Christina Bade performing such work and contributing from her own money toward the purchase of necessary supplies for the family, she, of course, living in the same house and eating at the same table. This allowance of support to Louisa Bade continued even after the removal to the city of Plymouth, but in December, 1900, Christina became sick and disabled and herself applied to the city for aid, which, being furnished her and the bill presented to the county and paid, constitutes the basis of the present suit, on the theory of persisting legal settlement in defendant town. The only material question submitted to the jury was whether, in the sums which the town of *Sheboygan Falls* paid to Louisa Bade within each of the years from July 1, 1898, to Decem-

ber 11, 1900, was included any sum paid by the town with the intention or for the purpose on the part of its supervisors of therewith or thereby aiding or supporting Christina Bade as a poor person. The jury answered affirmatively as to each of the three annual periods. Motion was made to reverse the answers to this question, and for judgment, and also for a new trial, which being denied, judgment was entered in favor of the plaintiff for the amount claimed, from which the defendant appeals.

Francis Williams, for the appellant.

Edward Voigt, district attorney, for the respondent.

DODGE, J. We have been unable to avoid the conclusion that the questions presented in this case have not been fully tried or decided. Christina Bade's legal settlement in *Sheboygan Falls* had undoubtedly been extinguished by her two years of residence outside of that town, unless, during each year thereof, she had been, in some degree at least, supported as a pauper. *Scott v. Clayton,* 51 Wis. 185, 8 N. W. 171. Mrs. Bade was, confessedly, not a pauper in fact, being capable of earning her own living, and having, at least during the first year, some money; but this fact is not conclusive against the possibility of her being supported as a pauper. *Ettrick v. Bangor,* 84 Wis. 256, 54 N. W. 401. The conceptions involved, however, in the expression "supported as a pauper" are twofold. It is not only essential that aid should have been given by the town, but that such aid should have been applied to or received by the supposed pauper. Instance a case where a town may intrust to a third person supplies intended for the supposed pauper, which, however, are diverted and were neither needed, nor in any wise received, by the latter.

The only question submitted to the jury upon the trial of this case was whether the town officers paid the money with the intention of aiding or supporting Christina Bade as a

poor person. This could exhaust the issues only in case the evidence was undisputed that she did receive the aid or some part thereof. True, there is no dispute but that she took her meals at the table of the family of Louisa Bade and, doubtless, consumed food paid for in whole or in part with the moneys furnished the latter by the town. But this is not conclusive. One, though living in the family and eating at the table of a pauper aided by the town, who pays his board, certainly cannot be said to receive aid as a pauper merely because his landlady may have used moneys furnished her by the town to purchase the food which she sells him and he eats; nor can it make any difference that such board be paid for in services instead of money, especially if the services are such as to enable some other member of the family to devote his time or labor to earning money for its support, thus rendering sufficient a less contribution from the public.

We find in the record considerable evidence from which the jury might have found that Christina Bade occupied such a position and did earn the board and lodging she received. It appears that, though sixty-seven years of age, she was active, physically capable to, and did at times, earn money by working for others, notably as a nurse. It appears, too, that at the time of consultation between Louisa Bade and the supervisors as to the amount necessary for herself and family of eight children that amount was fixed with reference to her own capacity by working for others to earn a share of their maintenance; but that her ability to do this was dependent upon her being relieved from the care of the household and of the children by Christina's devoting herself thereto and foregoing other employment. It is at least inferential from the evidence that this plan was generally followed. Besides this, it is in evidence that Christina paid money to her daughter-in-law, Louisa, for the purchase of necessaries for the latter's family. It is at least a reasonable inference that the home which Christina enjoyed in this struggling, not to say destitute, family was not such as to command much price.

The question, therefore, was presented whether it could fairly be said that Christina received as a pauper, and not merely as return for her own services and money, any portion of the aid furnished by the defendant town. We are clear that such question, which was one of fact, cannot be answered in the affirmative as a matter of law, but that it should have been submitted to the jury for their answer in the light of all the facts, circumstances, and reasonable inferences to be drawn therefrom. This court has decided that there may well arise the question of fact to be decided whether some member of a family whose head receives aid from a town does himself receive any part of it. *Ettrick v. Bangor,* 84 Wis. 256, 54 N. W. 401. In absence of finding on this question the verdict fails to support the judgment.

By the Court.—Judgment reversed, and cause remanded for a new trial.

LUETZKE and others, Respondents, vs. ROBERTS and others, imp., Appellants.

November 9—December 4, 1906.

Appeal and error: Findings, when disturbed: Corporations: Subscription to stock: Promoters: Fraudulent representation: Cancellation of instruments: Evidence: Substituted service: Appearance: Jurisdiction of the person: Equity: Remedies: Personal judgment: Measure of damages.

1. Where the evidence adduced on an issue is conflicting, and there is no clear preponderance to support appellant's claim, the findings thereon will be affirmed.
2. In an action to cancel a note given for subscription to corporate stock, the evidence, stated in the opinion, is *held* to sustain findings that two of the parties appearing on the subscription contract as purchasers of shares were not *bona fide* subscribers.
3. Where plaintiffs signed a subscription contract for shares of stock in a proposed corporation, upon an agreement between each subscriber, respectively, and the promoters of the corporation that no signature to such contract would be binding until

bona fide subscribers thereto for all the shares of stock had been obtained, and the promoters presented a list of persons, some of whom were not in fact *bona fide* subscribers, and thereby induced plaintiffs to execute joint notes for the amount of the total subscriptions, the action of the promoters was a wrong, fraudulent in its nature, which rendered the transaction based on it void as against plaintiffs.

4. In such case representations by the promoters' agent that the parties whose names were on the subscription contract and who had not signed the notes when plaintiffs executed them were then ready and willing to become joint makers of the notes, and that if they did not sign the notes they would pay in cash for the shares for which they had apparently subscribed, were material, and, their falsity being shown, such representations were fraudulent and rendered the transaction voidable.
5. In an action planted in equity, demanding cancellation of notes upon the ground of fraud, there was substituted service, but the defendants appeared in the action and answered generally, denying the fraud and insisting upon the validity of the notes. With such answer defendants appeared at the trial and litigated all the issues thus raised. *Held*, that the court was thereby given jurisdiction of the defendants personally, and was empowered to render whatever personal judgment was warranted by the facts and circumstances adduced within the litigated issues of the cause.
6. The effect of such appearance was to waive the want of personal jurisdiction under substituted service, and operated to confer jurisdiction as to defendants, and thus to change the character of the proceeding from one *in rem* to one *in personam*.
7. In an action in equity to cancel notes on the ground of fraud the court found, among other things, that the transaction was fraudulent; that when the action was commenced the plaintiffs had ground to and did believe that the defendants owned and held the notes in question, and that they had not pledged or hypothecated them; that they properly demanded that defendants be commanded to bring the notes into court to be canceled and annulled, and that after the action was commenced the defendants had transferred the notes to *bona fide* purchasers for value. *Held*, that such facts presented a case wherein the equitable relief sought could not be awarded, and that the only relief available was to offset plaintiffs' liability on the notes by a judgment for pecuniary compensation.
8. In such case compensatory damages are ascertainable and can be awarded in advance of actual payment of the notes by plaintiffs.
9. In such case the correct measure of damages is the amount called for by the face of the notes, with interest.

APPEAL from a judgment of the circuit court for Manitowoc county: MICHAEL KIRWAN, Circuit Judge. *Affirmed.*

Action to cancel and annul three promissory notes, executed by the plaintiffs to the defendants *Roberts, Legget,* and *Hanen,* who were copartners doing business under the name of "Westfield Importing Company" of Westfield, Indiana. The defendant John Gutman signed the notes. Upon his refusal to join as plaintiff in the action he was made a defendant. The defendants Schmitz, Burke, and Craite were attorneys for *Roberts, Legget,* and *Hanen* and were joined as parties in the action upon the ground that plaintiffs believed the notes in question were in their possession as such attorneys. They with their principals were temporarily restrained from transferring or parting with the possession of the notes. The defendants Alton P. Nave and the Citizens' National Bank, a foreign corporation, after the action had been begun, petitioned, as *bona fide* owners of the notes, to be made parties defendant, and by order of the court they were allowed to intervene and were made parties defendant, whereupon they appeared generally in the action and served their answers. Before trial the complaint and answers were severally amended at different times. These need not be particularly recited. After trial, upon notice, the complaint was further amended to conform to proof, received without objection, to the effect that the principal defendants had secured the subscriptions of plaintiffs and others for shares in the proposed company upon the representation, promise, and agreement with them that they would expressly warrant the mentioned horse to be sound and free from disease. The court's findings cover the facts of the case sufficiently to present the questions upon which error is assigned upon this appeal. The material facts found by the court are as follows: In January, 1903, the defendants *Roberts, Legget,* and *Hanen* were copartners and continued so until after this action was commenced. They were engaged, under their firm name, in the

buying and selling of horses, their principal place of business being Westfield, Indiana. E. M. O'Connell was their agent, and as such agent exhibited their horse, named "Fusil," to the plaintiffs and others at the villages of Valders and St. Nazianz in Manitowoc county, for the purpose of making a sale. To make a sale of the horse, O'Connell presented to plaintiffs and others a subscription agreement of the tenor following:

"We, the undersigned subscribers, realizing the necessity of improving our stock, do hereby agree to pay the Westfield Importing Company $100 for each share in the Percheron Horse Company now being formed at Valders, Wis., to buy one Percheron stallion of the Westfield Importing Co., of Westfield, Ind. Capital stock, $3,000. Name of horse, Fusil. 31,079 (48,951). Payments to be made, one third in one year, one third in two years, one third in three years, security by joint notes with interest or by cash."

He solicited subscriptions to the undertaking, and secured plaintiffs' assent and subscriptions

"upon an understanding and agreement between each of them, respectively, and the Westfield Importing Company that no signature to said contract would be binding until *bona fide* subscribers thereto for thirty shares had been obtained by said Westfield Importing Company."

Prior to February 28, 1903, plaintiffs were informed by O'Connell that he had secured *bona fide* subscriptions to the written contract for the thirty shares. Relying upon such representation as true and correct, plaintiffs signed and executed three promissory notes, each for $1,000, in form, to wit:

"$1,000.00. February 28th, 1903.

"Sixteen months after date, for value received, we or either of us, promise to pay the Westfield Importing Co., or order, $1,000.00 at the Manitowoc Savings Bank, with interest at 6 per cent. per annum, interest payable annually."

The two other notes were payable in two years and four months and three years and four months after date. Eleven

of the persons who were represented to plaintiffs as subscribers to the subscription contract for shares in the horse refused to sign these notes after plaintiff had signed them, and the Importing Company has never collected or enforced payment from them upon their alleged subscriptions. An action was instituted against one of such subscribers, Knut Berg, by the company to recover $100, the amount of one share in the Percheron Horse Company, which action terminated by entry of judgment dismissing the complaint on June 22, 1903, the date the instant action was begun. Two of the alleged subscribers to shares in the Percheron Horse Company, named Alfson and Nelson, were not in fact *bona fide* subscribers, though their names were on the subscription contract. They had signed and made their subscriptions upon the express oral understanding and agreement between them and O'Connell, as agent of the Importing Company, that such subscriptions were not to hold them to liability on the contract. It was further represented by the agent, O'Connell, to three of the plaintiffs that no signature to these notes would be binding until every subscriber to the shares in the Percheron Horse Company had signed them, or, in lieu of signing these notes, had paid their shares in cash. To the other plaintiffs in this action it was represented that all the other subscribers would sign these notes or pay their subscriptions in cash, and that such payments, to apply on the purchase price, would, in case of default, be enforced against them severally. Plaintiffs relied on this, but none of these conditions have been performed, nor has the Importing Company enforced such payments. The court also found that the representation by O'Connell to the effect that he had obtained subscriptions for thirty shares of $100 each in the proposed Percheron Horse Company was in fact untrue, that he knew it to be false, and that plaintiffs believed it to be true, relied on it, and were thereby induced to execute the notes. It was also found that plaintiffs had good reason to believe and did

believe that the defendants—copartners in the Importing Company at the time this action was commenced—had these notes, and had not sold, pledged, or hypothecated them or any of them; that plaintiffs before action offered the horse in question to these defendants and demanded the return of the notes; and that defendants refused to receive him and have so refused to receive him ever since, and have not returned the notes to plaintiffs. Plaintiffs, therefore, have been compelled to keep, feed, and care for the horse ever since, and such feed and care is found to be worth $12 per month.

The court found upon the issues that the defendants Nave and the Citizens' National Bank became the holders and owners of these notes in good faith, before maturity, and without notice or knowledge of any infirmity as to their validity, and that plaintiffs were liable thereon to such defendants, but that, as between plaintiffs and the defendants *Roberts, Legget,* and *Hanen,* the notes were fraudulent and of no effect, and that they had fraudulently and wrongfully transferred them under circumstances which enabled the transferees to collect and enforce them against plaintiffs to their damage to their face amounts, namely, the sum of $3,000, with interest from their date. Upon these findings the court held that the equitable relief prayed for in the complaint could not be awarded, but it retained the action and awarded the only relief available to plaintiffs, namely, a recovery of damages in the sum of $3,000, with interest, and costs of the suit. From this judgment the defendants *Roberts, Legget,* and *Hanen* appeal.

For the appellants there was a brief by *Burke & Craite,* and oral argument by *I. Craite.*

For the respondents there was a brief by *A. L. Hougen* and *Nash & Nash,* and oral argument by *L. J. Nash.*

SIEBECKER, J. Error was assigned upon the court's finding that two of the parties, appearing on the subscription contract

as purchasers of two shares in the company about to be organized for the purchase of the horse, were not *bona fide* subscribers, but that they had made such subscription with the express understanding between them and the defendants who owned the horse that they were not to be liable on such subscriptions. The evidence adduced on this issue is conflicting, but we can find no such clear preponderance of the evidence in support of appellants' claim as to warrant reversing the conclusion of the trial court thereon. The effect of the transaction can scarcely be in doubt in view of the conditions under which the plaintiffs appended their signatures to the subscription agreement. The court finds the fact, by consent of counsel for all the parties to the action, that

"plaintiffs [signed] the subscription contract for a share or shares of stock in the proposed horse company, upon an understanding and agreement between each of them, respectively, and the Westfield Importing Company that no signature to said contract would be binding until *bona fide* subscribers thereto for thirty shares had been obtained by said Westfield Importing Company."

An all-important fact to plaintiffs was that all the persons represented as being subscribers to this undertaking would be mutually bound to pay the $3,000 purchase money of the horse, hence their insistence that they were not to be liable on the subscriptions until the mutual agreement was subscribed by *bona fide* subscribers under the agreement with defendants. When defendants presented a list of persons, some of whom were not subscribers, and thereby induced plaintiffs to execute the notes in question, their action was a wrong, fraudulent in its nature, and rendering the transaction based on it void as against plaintiffs. The result is that the subscription contract, pursuant to which the notes were given, never became a binding agreement on the *bona fide* subscribers, and therefore could not be a valid basis for the notes. It is urged that the false representation by defendants' agent, to the effect that all

subscribers to the subscription contract who had not signed the notes when plaintiffs executed them would sign them or pay their amount in cash, and, in case of their refusal, payment would be enforced, was not a declaration on which plaintiffs could rely as a condition of executing the notes in question. This is urged upon the ground that it was merely an expression of opinion concerning the probable course of business, and was not a positive statement of fact. We cannot accede to this claim. The statement was that the parties whose names were on the subscription contract and who had not signed the notes when plaintiffs executed them were then ready and willing to become joint makers of the notes, and that if they did not so sign the notes they would pay in cash for the shares for which they had apparently subscribed. These representations would be a material consideration in inducing plaintiffs to obligate themselves to join in the purchase of the horse, and they no doubt were thereby induced to sign the notes. Their falsity being shown, it makes the representation a fraudulent one and renders the transaction voidable. *Hodge v. Smith, post,* p. 326. We deem well founded the trial court's conclusion that these fraudulent acts infected the whole transaction, and rendered voidable the notes given by plaintiffs to the defendants *Roberts, Legget,* and *Hanen.*

It is, however, claimed that the court erred in awarding judgment for damages. The action is one planted in equity, demanding cancellation of the notes upon the ground of fraud. Appellants contend in the first place that, since the service of the summons on the principal defendants was by substituted service, the action must be treated as one *in rem,* and no personal judgment could properly be rendered against them. The summons was served as claimed, but it appears that these defendants appeared in the action and answered generally in the case, denying the allegations of fraud and insisting upon the validity of the notes; and raised no question by their an-

swer as to the rights of transferees of the notes. With such an answer they appeared at the trial and litigated all the issues raised by their answer. This appearance gave the court jurisdiction of them personally, and empowered it to render whatever personal judgment was warranted by the facts and circumstances adduced within the litigated issues of the cause. The effect of such appearance is to waive the want of personal jurisdiction under substituted service, and operates to confer jurisdiction as to them, and thus changes the character of the proceeding from one *in rem* to one *in personam*. *Pennoyer v. Neff*, 95 U. S. 714; *Upper Miss. Trans. Co. v. Whittaker*, 16 Wis. 220; *Heeron v. Beckwith*, 1 Wis. 17; *Heidenheim v. Sprague*, 5 Wis. 258, and cases in note; *Jarvis v. Barrett*, 14 Wis. 591; *Anderson v. Coburn*, 27 Wis. 558; *Damp v. Dane*, 29 Wis. 419; *German Mut. F. F. Ins. Co. v. Decker*, 74 Wis. 556, 43 N. W. 500; 2 Ency. Pl. & Pr. 646 *et seq.*, "Waiver of defective service." Appellants further urge that, if the court acquired jurisdiction of the persons of these defendants, it had no authority to enter a personal judgment against them, because such an adjudication improperly determines rights of the parties wholly outside of the issues presented. The court found that plaintiffs had ground to and did believe, at the time this action was commenced, that these defendants *Roberts, Legget*, and *Hanen* owned and held these notes; that they had not pledged or hypothecated them; that they properly demanded that defendants be commanded to bring them into court to cancel and annul them; and that these defendants, through their further wrongful and fraudulent acts, had transferred them to the defendant Nave, that he in turn transferred them to the defendant bank, and that both of them were *bona fide* purchasers for value; that no relief of an equitable nature is now available, and that the only relief now available to offset plaintiffs' liability on the notes is a pecuniary compensation. These facts present a case wherein the equitable relief sought cannot be awarded, and the only rem-

edy available is the one of damages. This brings the case within the principle followed in a number of decisions of this court, where the cause was retained and such legal remedy awarded as the facts and circumstances proven justified. In the case of *Cole v. Getzinger,* 96 Wis. 559, 71 N. W. 75, in treating of this subject, it is said:

"It appears to be well settled that where a court of equity obtains jurisdiction for the purpose of granting some distinctively equitable relief, such as . . . the rescission or cancellation of some instrument, and it appears from facts disclosed at the hearing, but not known to the plaintiff when he brought his suit, that the special relief prayed for has become impracticable, and the plaintiff is entitled to the only alternative relief possible,—of damages,—the court may, and generally will, instead of compelling the plaintiff to incur the double expense and trouble of an action at law, retain the cause, decide all the issues involved, and decree the payment of mere compensatory damages (Pom. Eq. Jur. § 237); especially since, by the Code, the distinction between courts of law and courts of equity has been abolished." *Hall v. Delaplaine,* 5 Wis. 206; *Hopkins v. Gilman,* 22 Wis. 476; *Combs v. Scott,* 76 Wis. 662, 45 N. W. 532; *Stevens v. Coates,* 101 Wis. 569, 78 N. W. 180; *Gates v. Paul,* 117 Wis. 170, 94 N. W. 55.

It is urged that compensatory damages cannot be awarded because they are not ascertainable under the facts found, and that plaintiffs must wait until they have made actual payment of the notes. This contention cannot be sustained. The court properly held that these notes in the hands of *bona fide* purchasers for value established a liability according to their terms against these plaintiffs, and that such liability was measured by the amount they call for on their face, with interest. We deem this the correct measure of damages in the case, and within the principle of the case of *Lyle v. McCormick H. M. Co.* 108 Wis. 81, 84 N. W. 18.

These considerations are decisive of the questions presented. We find no error in the record.

By the Court.—Judgment affirmed.

LINDSAY and others, Appellants, vs. FRICKE, Respondent.

November 9—December 4, 1906.

Sales: Breach of warranty: Conditions: Appeal and error: Pleading: Demurrer.

1. In an action for the price of a traction engine defendant counterclaimed, alleging breaches of warranty. It appeared from the contract set out in a counterclaim that, if the defendant failed to settle for the engine as provided in the contract, the warranty became void. *Held*, that an allegation of the counterclaim that defendant never refused to make settlement for the engine was a verity on an appeal from an order overruling a demurrer to the counterclaim, and rendered unnecessary consideration of the question whether defendant was bound to make settlement if demanded.
2. In an action for the price of a traction engine an allegation of a counterclaim that there was a breach of a special warranty entitling the defendant to damages is not inconsistent with contract provisions to the effect that *all* warranties should be void if the engine was not settled for, where the counterclaim avers that the defendant never refused to make settlement.
3. A contract for the sale of a traction engine contained a special warranty as to its capacity, and also a general warranty respecting material and construction which made no mention of capacity, and was followed by provisions that notice of the failure of the engine to fill "*this*" warranty should be given the seller, and that continued possession by the buyer for ten days should be conclusive evidence of the fulfilment of the warranty. *Held*, that the provisions as to notice and the effect of retaining the engine had no reference to the special warranty.

APPEAL from an order of the circuit court for Manitowoc county: MICHAEL KIRWAN, Circuit Judge. *Affirmed.*

This is an action of replevin to recover possession of a traction engine delivered to defendant. The complaint alleges that on the 22d day of August, 1905, defendant entered into the following contract with plaintiffs:

"Dated at Newton, August 22, 1905.

"*Lindsay Brothers, Milwaukee, Wis.:* Please furnish or ship for the undersigned, on or about August 25th, 1905, to

C. H. Fricke, at Newton, Wis., the following machinery: One 18-horse Russell traction engine, with 18-inch road wheels with diagonal cleats, and one headlight, and 150 foot of 8-inch 4-ply gaudy thresher belt. Without oil pump in place of lub. Also fixtures and free extras, as provided in current price list. We, the undersigned, agree to receive the above subject to the conditions named below, to pay the freight and charges thereon from Milwaukee, and further agree to pay to your order, on the arrival of the goods at the place above named, the sum of eight hundred and fifty dollars, as follows: Our note, due November 15, 1905, $850.00; and one 16-horse second-hand Rummely compound traction engine complete on board of cars at Newton, Wis. Notes to bear interest from November 15, 1905, at 6 per cent., to be given on your blanks, payable at Savings Bank, Manitowoc, Wis., and we agree to give as security a chattel mortgage on the goods purchased, and further: The above engine is to be guaranteed to pull a 36 x 60 Avery separator on the road or while threshing. As a condition hereof, it is fully understood and agreed: (1) That this order is given subject to the acceptance of Lindsay Bros., and that no promises, whether of agent or employee or attorney, in respect to the payments, security, or to the machinery named, will be considered binding unless made in writing and ratified by Lindsay Bros. (2) That title to said goods shall not pass until settlement is accepted by Lindsay Bros. (3) That any change of any one or more of these terms, or any addition to or alteration of this order, may be made by any one or more of us with the consent of Lindsay Bros., and that any and all of such changes or additions shall in no wise release us, or any of us, from liability of this order. (4) That the above articles are warranted to be of good material, well made, and, with proper management, capable of doing as good work as any similar article made in the United States. If said machinery, or any part thereof, shall fail to fill this warranty, written notice shall be given to Lindsay Bros., Milwaukee, Wis., and to the party through whom the machinery was purchased, stating wherein it fails to fill the warranty, and time, opportunity, and friendly assistance given to reach the machinery and remedy any defects. If the defective machinery cannot then be made to fill the warranty, it shall be returned immediately by the undersigned to the place where received,

and another furnished on the same terms of warranty, or money and notes to the amount represented by the defective machinery shall be returned, and no further claim be made on Lindsay Bros. Continued possession for ten days after first use shall be conclusive evidence that the warranty is fulfilled to the full satisfaction of the undersigned, who agree thereafter to make no further claim on Lindsay Bros., under this warranty. In case any casting fail, through defect in its material, during the first season, such defective piece shall be replaced without charge, except freight or express charges; but on any claim for replacement of defective castings the defective piece shall be presented to Lindsay Bros., or to the dealer through whom the machinery was ordered, and shall clearly show the defects. Defects or failure in one part shall not condemn or be grounds for claiming renewal, or for the return of any other part. It is expressly agreed as a condition of this warranty, that the cylinder speed of threshers shall not exceed 1,200 revolutions per minute; that the driving of any independent stacker, or any other device not furnished with the thresher, from any part of same, shall invalidate this warranty as regards such thresher, unless such attachment shall be approved by Lindsay Bros., and such stacker be operated without change of speed, or impeding the operation of any part of the thresher. This warranty shall not include levers for horse powers, nor will any be replaced on account of breakage. All warranties to be invalid and void in case the machinery is not settled for according to above agreement, when delivered, or if this warranty is changed, whether by erasure, addition, or waiver. Warranty rendered void shall be restored only by an agreement in writing. Where special attachments, saws, or belting are ordered and furnished, the manufacturers' warranty only is extended.

"Postoffice, Manitowoc, Wch. Ave., 1802.

"Witness: F. Kohl. C. H. Fricke. [Seal.]"

The complaint further alleges that the plaintiffs duly performed the contract on their part, delivered the property to defendant, and defendant took possession of the same and delivered to plaintiffs the second-hand engine; that defendant refused to give the note for $850 as required by the contract, and refused to make payment on November 15, 1905;

that before action plaintiffs duly demanded possession of the property so sold, which was refused.

Defendant answered, admitting that he entered into the contract, the demand and refusal to deliver the engine to plaintiffs, and denied generally the other allegations of the complaint. Defendant by way of counterclaim set up the contract with plaintiffs; the delivery of his second-hand engine; that plaintiffs under their contract guaranteed the engine furnished to be of sufficient power to haul, run, and operate defendant's separator; that defendant, before execution of said contract, required the following special warranty to be inserted therein: "The above engine is to be guaranteed to pull a 36 x 60 Avery separator on the road or while threshing"—and relied upon the same in making said purchase; that said engine was not powerful enough to run or operate his separator; that the engine delivered by plaintiffs to defendant was not in compliance with said warranty, and was not powerful enough to operate his separator; that defendant notified plaintiffs and their agent that said engine was not in compliance with the guaranty, and that plaintiffs sent a representative to defendant, who gave defendant instructions respecting the management of said engine, and claimed and represented that by following such instructions the engine would prove powerful enough and would comply with said warranty, and, relying upon such representations, defendant continued to use said engine and followed such instructions, but said engine remained and continued not powerful enough, and defendant again notified plaintiffs of such fact, and plaintiffs on September 11, 1905, sent two men, who claimed to be experts, and they endeavored to remedy the defects, but failed; that thereupon defendant again notified plaintiffs that he would not accept said engine, and that it was not as guaranteed, and offered to return the same; that plaintiffs again represented that said engine was powerful enough to haul, run, and operate defendant's separator, and

that they would place it in condition so to do, and, relying upon said representations, defendant continued to use said engine, and on September 22, 1905, plaintiffs sent another man, who claimed to be an expert and could put said engine in condition to comply with the warranty, and said man remained with defendant from September 22d to September 30th endeavoring to place said engine in condition and to make it comply with said warranty, but failed. The counterclaim further alleges:

"That upon said failure said defendant again notified said plaintiffs that he would not accept said engine, that it was not as represented and as guaranteed, and offered to return said engine, but plaintiffs again represented and claimed to defendant that said engine would be made powerful enough to haul, run, and operate said separator, and that they would make it so, and requested said defendant to continue to use it, and that defendant continued to use it until October 10, 1905, when plaintiffs again sent a man to the defendant to place the said engine in condition to be powerful enough to haul, run, and operate defendant's said separator, but said man did nothing with said engine, but told said defendant that, if said engine was remodeled by placing some more pipe into it, it would then be powerful enough to haul, run, and operate defendant's said separator. That immediately after that defendant again notified plaintiffs that he would not accept said engine, because it was not as represented and guaranteed, and because it was not powerful enough to haul, run, and operate defendant's said separator, and then defendant continued to use said engine to complete some jobs he agreed upon, and where the farmers had relied upon his promise to come and do their threshing, until the 14th day of October, 1905, upon which day he ceased to use said engine and has not used it since. That said engine, at the time of its delivery by plaintiffs to defendant, and at no time since said delivery, was as represented and guaranteed, but, on the contrary, was not as represented and guaranteed, and never was powerful enough to haul, run, and operate said defendant's separator while threshing grain. That the reason why he continued to use said engine was because the plaintiffs claimed and represented

to defendant that said engine was powerful enough and could be made powerful enough to haul, run, and operate his said separator, and, relying upon said representations, he believed that said plaintiffs would make said engine powerful enough to so haul, run, and operate his said separator, and for no other reason whatever. That soon after said October 14, 1905, defendant called upon the plaintiffs at the city of Milwaukee, Wis., and then and there again notified them that said engine was not as represented and as guaranteed; that it was not powerful enough to haul, run, and operate his said separator, and offered to return said engine, headlight, and belt to said plaintiffs, and then and there demanded of said plaintiffs an engine that was powerful enough to haul, run, and operate his said separator properly, as agreed in said contract, but said plaintiffs refused to furnish said defendant another engine and still refuse so to do; that upon such refusal to furnish defendant another engine, one powerful enough to haul, run, and operate said separator, this defendant offered to return said engine to plaintiffs, and demanded of them the return of his own engine or the value thereof, but this the said plaintiffs refused to do and still refuse to do. That up to this time said plaintiffs have failed, neglected, and refused to furnish to said defendant an engine powerful enough to haul, run, and operate his said separator, and have failed, neglected, and refused to return to said defendant his own engine by him delivered to them as hereinbefore alleged, or to pay the value thereof. That the property sold by said plaintiffs to said defendant, by reason of said engine not being as represented and guaranteed and not being powerful enough to haul, run, and operate defendant's said separator, was then and there worth less than the sum to be paid therefor, and less than it would have been worth if the capacity and condition it was warranted to be, by the sum of six hundred fifty dollars. That, by reason of said engine not being powerful enough to haul, run, and operate defendant's said separator, said defendant lost much valuable time, and was greatly annoyed and inconvenienced thereby, and lost a great amount of business, all to his damage the sum of two hundred dollars. That defendant never refused to make settlement with said plaintiffs, but always was ready, and is now ready, to make settlement with them, provided they furnish him the engine required by said contract. That

by reason of the premises this defendant claims a lien upon said engine delivered him for the sum of six hundred dollars, the value of the engine delivered by him to plaintiffs, which said plaintiffs refused and still refuse to pay. That by reason of the premises this defendant was damaged and misled to his damage as follows: (1) Six hundred dollars, the value of his engine delivered to plaintiffs by defendant as part payment under said contract. (2) Two hundred dollars, the value of his time lost by reason of said engine not being as represented and guaranteed, and his annoyance, inconvenience, and loss of business. (3) Six hundred fifty dollars, the difference in the value of the property sold to defendant by plaintiffs, as it was at the time of the delivery and as it would have been had it been as represented and warranted. That no part of said damage has ever been paid by said plaintiffs to said defendant, and the whole thereof is now due and owing said defendant from said plaintiffs.

"Wherefore defendant demands judgment of this court, and against said plaintiffs: (1) That plaintiffs take nothing in this action. (2) That defendant have and recover of said plaintiffs the sum of fourteen hundred fifty dollars, damages as aforesaid, together with interest from August 22, 1905. (3) That defendant have judgment against said plaintiffs for the costs of this action."

The plaintiffs demurred to the counterclaim for want of facts sufficient to constitute a cause of action and because the cause of action stated was not pleadable as a counterclaim. The court below overruled the demurrer, with leave to plaintiffs to reply within twenty days on payment of $10 costs. From the order overruling demurrer this appeal was taken.

For the appellants the cause was submitted on the brief of *J. E. Wildish.*

A. P. Schenian, for the respondent.

KERWIN, J. The contention on the part of counsel for appellants to reverse the order overruling the demurrer to the defendant's counterclaim is that it appears from the counterclaim (1) that defendant failed to settle for the machine

as provided in the contract, and therefore all warranties became void; (2) that defendant failed to return the engine, but accepted it, and therefore has no claim for damages. The counterclaim, on demurrer, must stand or fall upon the allegations thereof. It is alleged therein that the defendant never refused to make settlement for the engine, and this allegation is a verity upon this appeal. Therefore all other questions discussed, as to whether defendant was bound to make settlement if demanded, need not be considered. It is alleged that the special guaranty inserted in the first part of the contract, to the effect that the engine is guaranteed to pull a 36 x 60 Avery separator on the road or while threshing, was so inserted in the contract at the special instance and request of the defendant, and that in making the contract of purchase he relied upon said guaranty. It is further alleged that this guaranty was broken, and that the engine was not capable of pulling the separator mentioned, in consequence of which defendant sustained damages. So it is very plain from the allegations of the counterclaim that there was a breach of this special warranty, entitling the defendant to damages, and it is not rendered void by the other clause in the contract to the effect that *all* warranties shall be void if the machinery is not settled for, because the counterclaim alleges that the defendant never refused to make settlement, which averment is consistent with other allegations of the counterclaim.

But it is claimed that it appears from the allegations of the counterclaim that the defendant never returned the engine, but, on the contrary, accepted it, and that under the contract he was bound to comply with the provisions requiring notice to be given and opportunity furnished to plaintiffs to remedy the defects, and, if not made to fill the warranty, the engine should be returned immediately, and that he failed to comply with this provision and accepted the engine, and therefore has no claim for damages. It is plain from

the allegations of the counterclaim and the terms of the contract referred to therein and set up in the statement of facts that the engine was sold with the special guaranty to the effect that it would pull a 36 x 60 Avery separator, and for a breach of this guaranty the defendant is entitled to damages, or, in case he has not accepted, he may rescind the contract, return the engine, and recover the consideration paid. But it is said by plaintiffs that under the contract defendant had no election; that the provisions of the contract respecting notice and return were exclusive and must be strictly complied with, and that defendant not only failed to comply with such provisions, but accepted the engine, and therefore has no remedy.

The question turns upon the construction of the contract of purchase. In addition to the warranty heretofore mentioned it contains a warranty to the effect that the article is of good material, well made, and with proper management capable of doing as good work as any similar article made in the United States, and that, if said machine shall fail to fill *"this"* warranty, written notice shall be given to the plaintiff and to the party through whom the machinery was purchased, stating wherein it failed to fulfil the warranty, and opportunity and assistance given to remedy the defects, and, if the machinery cannot then be made to fill the warranty, it shall be returned immediately and another furnished on the same terms of warranty or money refunded, and that continued possession for ten days after first use shall be conclusive evidence that the warranty is fulfilled. It is very plain that this warranty is entirely separate and distinct from the special warranty in the first part of the contract to the effect that the engine would pull the separator. This latter warranty makes no mention whatever of the capacity of the engine, and the conditions to be complied with clearly have no reference to the first warranty. In other words, it is only in case of a breach of the warranty respect-

ing being of good material, well made, and capable of doing good work that the defendant was obliged to give the notice and comply with the conditions specified in the contract, because by its language such conditions refer exclusively to this warranty, and not to the special warranty stated in the first part of the contract, to the effect that the engine is guaranteed to pull a 36 x 60 Avery separator on the road or while threshing. There is no allegation in the counterclaim that there was any breach of this latter warranty, but simply a breach of the first; and, there being no condition attached to the first warranty respecting notice or return, the ordinary rules of damages with regard to breach of warranty apply. It is very clear from the contract that the defendant was not obliged to give notice or return in case of breach of the first warranty specified in the contract, to the effect that the engine would pull the separator.

It is claimed by counsel for appellant that the allegations of the counterclaim show an acceptance of the engine. True, the counterclaim alleges that, after defendant discovered that the engine was not in compliance with the warranty and notice given that he would not accept it, he used it for a few days to finish up some work; but it also appears from other allegations that the reason he used the engine was that he expected plaintiffs would remedy the defects and make it comply with the warranty, as they had repeatedly promised and attempted to do. It is not altogether clear, upon the allegations of the counterclaim, whether defendant accepted the engine or not. If he did not, he had two remedies: either to rescind the contract because of breach of warranty and return the machine and recover consideration paid, or retain it and recoup his damages for breach of warranty. But it is unnecessary to determine upon this appeal whether the counterclaim shows an acceptance of the engine or not, and we do not so determine, because in any event the defendant, for a breach of the special warranty to the effect that the en-

gine was powerful enough to pull a 36 x 60 Avery separator, was entitled at least to recoup his damages, whether he was entitled to the other remedy or not.

It is unnecessary to discuss the cases referred to by counsel for appellant, because it is very plain that the facts in this case clearly distinguish it from the cases cited. Here the counterclaim is based upon a breach of a special warranty, without any conditions attached thereto, and therefore, whether defendant accepted the engine or not, he is entitled to recoup his damages. The conditions respecting the second warranty set out in the contract apply exclusively to that warranty and have no reference to the first. It follows, therefore, that the order of the court below was right and must be affirmed.

By the Court.—The order overruling the demurrer to the counterclaim is affirmed.

SEIDEMANN, Administrator, Appellant, vs. KARSTAEDT, Respondent.

November 9—December 4, 1906.

Executors and administrators: Extension of time for presentation of claims.

Under sec. 3840, Stats. 1898 (providing, among other things, that for good cause shown and upon the notice therein prescribed the time originally limited for the presentation of claims against a decedent may be extended), where the facts alleged in a verified petition for an order extending the time for filing claims are not controverted, the county court may, in its discretion, make an order extending the time, although the allegations of the petition are not substantiated by proof other than petitioner's oath of verification.

APPEAL from an order and a judgment of the circuit court for Sheboygan county: MICHAEL KIRWAN, Circuit Judge. *Affirmed.*

After the death of the intestate the county court on June 28, 1905, made an order in the matter of the estate limiting the time for the presentation of claims against said estate to December 28, 1905. The petitioner did not present his claim within the time so limited. February 3, 1906, he presented to the county court his duly verified petition to the effect that he had a valid and legal claim against the estate evidenced by writing signed by the deceased January 1, 1902, and upon which the deceased had, during his lifetime, paid the interest to January 1, 1904, and upon which there was then due $1,500 and interest from said last-named date, and therein gave his reasons and excuses for failure to present his claim on or before December 28, 1905, and prayed that the time for presenting and filing claims against said estate be extended for three months beyond said last-named date. Upon reading and filing that petition the county court on February 7, 1906, made an order requiring the administrator of the estate and the widow of the deceased to "show cause upon said petition, the files and records of said cause and matter, and all proceedings had therein, before the county court" February 20, 1906, and ordered that copies of said order and petition be served upon said administrator and said widow at least ten days before said time of hearing; and they were so served accordingly. February 20, 1906, the administrator made and filed with the county court his verified answer to said petition and order to show cause, and, upon information and belief, said that since the death of the deceased the petitioner knew the exact condition of said estate and at all times knew that such proceedings were pending; that the time for creditors to present their claims had been limited and when the same expired, and that the petitioner did not use ordinary care and diligence in presenting his claim against said estate. After hearing the parties and evidence submitted and arguments of counsel and the court having taken the matter under advisement, on March 24, 1906, the county court con-

sidered and ordered that the time for creditors to present their claims against said estate be and the same was thereby extended for three months from December 28, 1905—the time previously limited; and it was therein and thereby further ordered that such claims so to be presented be filed and heard and adjusted by the county court on April 10, 1906. From that order the administrator duly appealed to the circuit court. Said matter having been brought on for hearing in the circuit court upon the records of the county court duly certified to the circuit court, and the cause having been submitted and heard on the records and papers of said county court herein specified solely—no further or other proofs having been introduced by either party,—and after arguments of counsel, the court being fully advised, it was ordered and adjudged by the circuit court that the said order of the county court extending the time for creditors to file their claims against said estate be and the same was thereby in all things affirmed, with costs taxed at $19.71, to be paid out of said estate. From that order and judgment the administrator appeals.

For the appellant there was a brief by *Voigt & Voigt,* and oral argument by *Edward Voigt.*

For the respondent the cause was submitted on the brief of *F. Vollrath.*

Cassoday, C. J. The statute provides that "for good cause shown and upon such notice" as is therein prescribed, "and not later than sixty days after the expiration of the time" originally fixed for the presentation of claims, "such time may be extended" by the county court, "but not beyond two years from the date of the letters" of administration. Sec. 3840, Stats. 1898. Here the original time fixed for the presentation of claims was December 28, 1905, and the order extending such time was made less than sixty days thereafter. There is no claim that the petition was insufficient to

bring the case within the statute. It is conceded that if the facts therein alleged had been established by proofs, independently of the petition itself, then good cause would have been shown, within the meaning of the statute. The claim seems to be that such order to show cause based upon such verified petition was at most a mere notice of what the claimant proposed to prove upon the hearing. Counsel contend that, as the allegations of the petition were not substantiated by proof, there was nothing before the county court on which its order extending the time could be based. The statute makes no such requirement. The petition was verified, and so, of course, the facts therein alleged were supported by the oath of the petitioner. It was certainly competent for the administrator to admit the facts so alleged by demurrer or otherwise. In so far as the administrator failed to controvert such facts they were left supported by the oath of the petitioner. The evasive answer made did not wholly destroy the probative force of the verified petition. It certainly left the matter for the determination of the county court. Such determination was, to a certain extent, a matter addressed to the sound discretion of that court. Such has been the ruling under a similar statute in other jurisdictions. *In re Mills,* 34 Minn. 296, 25 N. W. 631; *State ex rel. Security T. Co. v. Probate Court,* 67 Minn. 51, 69 N. W. 609, 908; *Walker v. Lyman's Adm'r,* 6 Pick. 458. We perceive no abuse of discretion in the case at bar.

By the Court.—The order and judgment of the circuit court is affirmed.

BLAHNIK, Respondent, vs. BARTA and others, Appellants.

November 9—December 4, 1906.

Fraudulent conveyances: Findings: Evidence.

In an action to set aside a conveyance of lands as in fraud of creditors, the findings of the trial court, that such conveyance was made without consideration upon a secret trust to hold the title for the grantor's benefit and with intent to hinder and delay the plaintiff in the collection of her claim, are *held* supported by the evidence.

APPEAL from a judgment of the circuit court for Kewaunee county: MICHAEL KIRWAN, Circuit Judge. *Affirmed.*

For the appellants there was a brief by *Wigman, Martin & Martin,* and oral argument by *P. H. Martin.*

For the respondent the cause was submitted on the brief of *Geo. W. Wing* and *O. H. Bruemmer.*

WINSLOW, J. This is an action in equity brought by the plaintiff as a judgment creditor of the defendant *Frank Barta* against said *Frank Barta* and his son, the defendant *Joseph Barta,* and their respective wives to set aside a conveyance of real and personal property made by *Frank* to *Joseph* March 19, 1902, on the ground that it was made with intent to hinder and defraud the plaintiff and prevent her from enforcing and collecting a claim for damages which she then had against *Frank.* The conveyance in question covered eighty acres of land, forty of which constituted the homestead of the defendant *Frank,* and also covered all the personal property on the farm, being the entire property of said defendant. The court found that the conveyance was made without consideration upon a secret trust that *Joseph* should hold the title for his father's benefit and with intent to hinder and delay the plaintiff in the collection of her claim, and entered judgment setting aside the conveyance as to the forty acres of land not included in the homestead as

well as the nonexempt personal property, and the defendants appeal.

It appears that on or about December 16, 1901, and upon one or more occasions thereafter the defendant *Frank*, a farmer about forty-nine years of age, slandered the plaintiff in a public place by charging her with having murdered her father; that the plaintiff commenced an action to recover damages for such slander June 17, 1902, and obtained judgment for damages and costs therein aggregating more than $700 March 19, 1905; that the deed in question was executed by *Frank* to his son *Joseph* on March 19, 1902, and recorded on June 18th of the same year; that *Frank* then had six children ranging from seven to twenty-four years of age, of which *Joseph* was the eldest and was engaged in teaching school, and resided some four miles distant from the home farm; that, after the first utterance of the slander and prior to the execution of the deed, there was talk among the people of the neighborhood to the effect that the plaintiff was likely to sue the defendant *Frank* for said slander; that several years previously the plaintiff had sued *Frank* for a similar alleged slander, which suit was subsequently discontinued; that, after the conveyance was made, *Frank* continued to live on the farm with his family and manage it substantially as before; that in the spring of 1902, after the term of school closed, *Joseph* and his wife came to live on the farm and remained there with the parents for twenty-one months, during which time *Joseph* taught school and worked on the farm during vacations; that in December, 1904, he removed to Algoma and became a rural mail carrier, and has not since lived on the farm. The value of the farm appears to have been about $7,000, and of the personal property something over $500. The consideration for the execution of the deed as claimed by defendants consisted of (1) the assumption by *Joseph* of mortgages on the farm amounting to $1,100, and of an unsecured note of *Frank* for $300, also the discharge

of an alleged indebtedness of *Frank* to *Joseph* of $2,100; (2) an agreement by *Joseph* to pay to each of his two brothers $1,000, and to each of his three sisters $500, at majority; and (3) an agreement that the parents should be supported on the farm for life if they chose to remain there, and if they did not that they should receive $2,000 from *Joseph*. None of these agreements were expressed in the deed, which was a simple warranty deed, nor were they expressed in any writing. The court found that these agreements were not in fact made, and that the actual indebtedness from *Frank* to *Joseph* was but $360.

There were many other facts appearing in the evidence tending to throw light on this very remarkable transaction by which a comparatively young man with a large family stripped himself of his property without any apparent or adequate reason and placed the title in a son, who neither expected to operate it nor did in fact operate it. There was no direct evidence that *Joseph* knew of his father's fraudulent purpose, but there are many circumstances which persuasively tend to show that he must have known it. Careful reading of the evidence convinces us that the trial judge was right in his conclusions. Much time and space might be spent in reviewing the evidence, but it is not perceived how such a course would be useful.

By the Court.—Judgment affirmed.

PAPE, Appellant, vs. TOWN OF CARLTON, Respondent.

November 9—December 4, 1906.

Assessment roll: Power of town chairman to make purchases: Road machines: Statutes: "Last preceding assessment:" Pleading: Amendment: Appeal and error.

1. When an assessment roll has been corrected by the assessor and delivered to the town clerk pursuant to sec. 1064, Stats. 1898, it is an assessment roll within the meaning of ch. 83, Laws of

1899 (providing that the chairman of the town board may, upon petition of the taxpayers of one or more superintendent districts of such town, representing more than one half of the taxable property of such district or in each of such districts—to be ascertained from the last preceding assessment roll, and certified to as such by the town clerk of such town—and also of the superintendent of highways of each district, contract for a road machine), notwithstanding it is still subject to correction as to mistakes under sec. 1065.

2. If, after the assessment roll has been corrected by the assessor and delivered to the town clerk pursuant to sec. 1064, Stats. 1898, the chairman of the town is petitioned to purchase a road machine under ch. 83, Laws of 1899, the sufficiency of the petition, as to putting him in motion to obligate the town to make the purchase, is to be tested by such roll unless in the meantime another shall have been made.

3. It is sufficient to render one a competent petitioner under ch. 83, Laws of 1899, that he is a taxpayer of the road district when the petition is certified by the town clerk and presented to the chairman.

4. Under ch. 83, Laws of 1899, a petition dated June 14, 1900, was certified by the town clerk and presented to the town chairman on August 25, 1900. The assessment roll of 1900 was completed and on file prior to the time the petition was so certified and presented. The petition was signed by a sufficient number of taxpayers as shown by the assessment roll of 1900, but by an insufficient number under that of 1899. In an action for the purchase price of a road machine ordered by the town chairman under the authority of such petition, *held:*

(1) An allegation of the complaint, in effect, that the town chairman was "petitioned" on June 14, 1900, either standing alone or in connection with the date of the petition, did not control as to the date when an effective petition was presented.

(2) The language of ch. 83, Laws of 1899, "The chairman of the town board . . . may, upon being petitioned," reasonably points to the time of the certification of the petition for presentation to the chairman.

(3) The assessment roll of 1900 governed.

5. It is not error to refuse to allow a complaint to be amended by adding thereto a new cause of action arising *pendente lite.*

APPEAL from a judgment of the circuit court for Kewaunee county: MICHAEL KIRWAN, Circuit Judge. *Reversed.*

Action to recover on a contract for the purchase of a road machine, such contract having been made, as alleged, pur-

suant to a petition of taxpayers of road districts Nos. 6 and 10, of the town of *Carlton,* Kewaunee county, Wisconsin. The contract provided for payment for the machine in five instalments of $45 each, three of which were due at the time of the commencement of the action. The town defended upon the ground that the contract was void for want of the statutory requisites to the authority of the chairman of the town board to make it under sec. 2, ch. 83, Laws of 1899. At the close of the evidence the court decided that there were no controverted questions of fact by reason of stipulations made during the trial. Both sides moved for a directed verdict. The court granted the motion made on behalf of the plaintiff, taking a verdict for $168.30, subject to its opinion on the legal questions involved. There was a motion made on behalf of the plaintiff to amend the complaint so as to include the fourth instalment for the road machine, which fell due after the commencement of the action, and the motion was denied. The court finally decided that according to the facts stipulated on the trial and undisputed evidence the petition for the purchase of the road machine satisfied the requisites of ch. 83, Laws of 1899, as to road district No. 6, and also as to road district No. 10, if the names of Katie Drab and Fred Ihlenfeldt were entitled to be counted. In respect to that matter the court found that the name of Joseph Bohman appeared on the assessment roll of the town of *Carlton* for 1899 as the owner of $3,315 in value of taxable real estate, and $982 in value of taxable personal property in said district No. 10, and that Mrs. Drab and Fred Ihlenfeldt appeared upon the assessment roll of the town for the year 1900 as owners of the real estate assessed the previous year to Joseph Bohman, and his name appeared on such roll as the owner of taxable personal property to the amount of $435. There were not names of taxpayers representing the requisite amount of property appearing on the assessment roll of 1899 to satisfy the law aforesaid, but counting the

names of Mrs. Drab and Mr. Ihlenfeldt and the property assessed to them there were sufficient names representing the requisite amount of property appearing on the assessment roll of 1900. The petition for the purchase of the machine was dated June 14, 1900. In the complaint it was alleged that the chairman of the town board was petitioned in accordance with the statute on June 14, 1900, to contract for the machine. The petition was not presented to the chairman of the town board till August 25, 1900. On that date the town clerk affixed to the petition his certificate that it was signed by a majority of the taxpayers of the two districts mentioned, representing more than one half of the taxable property thereof according to the last previous assessment roll. The assessment roll of 1900 was completed and on file prior to the time the petition was so certified, but the petition must be regarded as having originated in the sense that it was signed by the persons whose signatures appeared thereon on the day of its date, to wit, June 14, 1900. The last previous assessment roll as regards that date was the roll of 1899. Therefore Katie Drab and Fred Ihlenfeldt were not qualified petitioners for the purchase of the road machine and the petition was insufficient to warrant making the contract. Judgment was accordingly rendered in favor of the defendant notwithstanding the verdict, dismissing the complaint with costs.

For the appellant there was a brief by *Otto Bruemmer*, attorney, and *L. J. Nash*, of counsel, and oral argument by *Mr. Nash*.

For the respondent the cause was submitted on the brief of *Geo. W. Wing* and *M. T. Parker*.

MARSHALL, J. From the statement it will be seen that the case turned in the court below on whether under sec. 2, ch. 83, Laws of 1899, authorizing the purchase by towns of road machines, the petition spoken of is to be signed by a majority

of the taxpayers of the road district, or districts, representing a majority of the taxable property therein according to the last previous assessment roll of the town prior to the date of the paper, the decision being in the affirmative. The language of such section, so far as necessary to be considered, is as follows:

"The chairman of the town board thereof may, upon being petitioned in writing by a majority of the taxpayers of one or more superintendent districts of such town, representing more than one half of the taxable property in such district or in each of such districts (to be ascertained from the last preceding assessment roll, and certified to as such by the town clerk of such town) and by the superintendent or superintendents of highways of each such district, contract," etc.

The arguments of counsel have been very helpful in reaching a satisfactory conclusion here, in that they probably brought to our attention all of the decisions of this court which from any standpoint could reasonably be said to affect the matter. Each feature of such arguments and of the learned discussion contained in the opinion of the circuit judge has been carefully studied. However, it is thought best not to treat such features here in all their details, but rather to give such attention to the authorities cited as to show generally the bearing they seem to have upon the precise point which appears to be vital on the appeal, and to confine the opinion otherwise, in the main, to the question involving such point as an original proposition, viz.: Under the statute quoted, are the signers of the petition to be regarded as petitioning the chairman of the town board for the purchase of a road machine, only as of the date of the paper signed by them, or are they to be regarded as petitioning such chairman at the time the paper is certified to by the town clerk and presented to such chairman? That involves this: Is it sufficient to render one a competent petitioner under the statute that he is a taxpayer of the road district when the

petition is certified by the town clerk and so presented? Appellant stands for the affirmative, and if he is right the petition in question should have been tested by the assessment roll of 1900 instead of that of 1899, if the former existed, within the meaning of the law, at the time the town clerk made his certificate.

We have little difficulty in passing successfully the contingency last suggested. It is considered that when an assessment roll shall have been corrected by the assessor and delivered to the town clerk under sec. 1064, Stats. 1898, which is required thereby to occur on or before the first Monday in August of the year it is made, it is an assessment roll within the meaning of ch. 83, Laws of 1899, notwithstanding it is still subject to correction as to mistakes under sec. 1065. The prior section speaks of the roll, when ready to be filed in the town clerk's office, as a completed roll, and so it is to all intents and purposes. In our view, if the chairman of a town is thereafter petitioned under said ch. 83 the sufficiency of the request, as to putting him in motion to obligate the town for the purchase of a road machine, is to be tested by such roll unless another shall in the meantime have been made. There is no authority cited to our attention, or which we can discover, throwing any light on this question. It must be disposed of as an original matter according to our best judgment.

We cannot agree that the allegations of the complaint as to the chairman of the defendant town having been petitioned on the 14th day of June, 1900, cut any controlling figure in the case, either standing alone or in connection with the date of the petition, even if we assume, for the purposes of the point, that the act of signing as to each petitioner relates to such date. The undisputed evidence is that the petition was not presented to the chairman of the town board till August 25, 1900. Therefore, if that be the time when, in contemplation of law, he was "petitioned," then the decision should

be accordingly, regardless of the mere conclusion pleaded that he was "petitioned" on June 14, 1900.

In the opinion of the circuit court we observe that considerable reliance was placed on *Siegel v. Liberty,* 118 Wis. 599, 95 N. W. 402. We are unable to give the effect to that case which the learned court attributed thereto. The point here at issue was not there discussed or decided. The case did not disclose, as we can discover, when the petition was signed or presented to the chairman of the town. It showed when the contract was made; that it was in December, 1899, and that the sufficiency of the petition was tested by the assessment roll of 1898. However, it does not necessarily follow because the contract was made after the assessment roll of 1899 was filed with the town clerk that the chairman of the town board was not "petitioned" to make the contract prior to the filing of such roll. In the printed case used upon the appeal it appears that the plaintiff alleged that the petition was not presented to the chairman till after the 3d day of November, 1899. That was put in issue by the answer and found in the defendant's favor. The printed evidence, as we read it, does not show the date of the petition or when it was signed or when it was presented to the town chairman. Certainly the question of whether the act of "petitioning" is referable to the date of the paper or to that of its presentation to the chairman of the town was not raised or discussed or referred to in any way, so far as we can discover.

Some reliance is placed on *State ex rel. Spring Lake v. Pierce Co.* 71 Wis. 321, 37 N. W. 231, and *State ex rel. El Paso v. Pierce Co.* 71 Wis. 327, 37 N. W. 233. Those cases arose under the law of 1885, authorizing county aid to towns in the building of bridges. The law provided for such aid in case of a town having voted to construct or repair any bridge or bridges wholly or partly within such town and provided for one half the cost of such construction or repairs and such cost exceeding one fourth of one per cent. of the

taxable property in the town "according to the last equalized valuation." The defendant, in the last case mentioned, at its annual town meeting in April, 1886, determined upon the building of a bridge and otherwise provided as indicated in the law of 1885, and after the equalized valuation of the taxable property of the town for that year was made, the county board was called upon to appropriate out of the county treasury sufficient money to defray one half the cost of the improvement. It was held that the last equalized valuation of the property of the town, existing at the time it acted on the bridge matter at its annual town meeting, was to be taken as the test of whether the county possessed authority to extend the aid requested, as the law contemplated that the right of the town thereto should become fixed upon its taking action as required by such law. We are unable to see how that decision points the way to a correct conclusion as to the question we have here. The obvious purpose of the law of 1885 is that the action of the town, satisfying the condition precedent to the obligation of the county, is to be taken with reference to an existing equalized valuation of taxable property in the former, and, therefore, necessarily the action of the county must be taken with reference to the same valuation.

State ex rel. C., M. & St. P. R. Co. v. Blackstone, 63 Wis. 362, 24 N. W. 72, which dealt with the law authorizing municipal aid in the construction of railroads, is referred to by respondent's counsel as suggesting that the qualification of a petitioner under such a law is to be determined as of the time of his signing the petition. We do not so understand that decision. The statute authorizes the acceptance by a municipality of a proposition of a railroad company for the construction of a railroad upon a petition bearing the signatures of a majority of the male persons residing therein who were assessed for taxes as shown by the last assessment roll. It provides for a day certain when the petition may be first presented to any such resident taxpayer for his signature. The

court held, confessedly by a somewhat arbitrary construction, that the law contemplates only signatures of taxpayers residing in the municipality on such day; that neither the date of the petition, the time of signing it, nor that of its presentation is material on the subject of residence; that one cannot qualify by moving into the town between the time when it is first competent to present the petition for signatures and the time for filing it with the town clerk, nor disqualify by moving out during such period. The court was persuaded to adopt that construction because of a seeming necessity that the law should provide a time certain by which to test the competency of all petitioners as to residence. The law under consideration here does not make residence in the road district an essential to qualification of a petitioner. The only requisite is that at the time the chairman of the town board is "petitioned" the petitioner shall be a taxpayer therein, as appears by the last previous assessment roll. It has two features as to which certainty should be looked for: First, the time when the chairman is to be regarded as "petitioned" within the meaning of the act; second, the status of the signers of the petition as to their being taxpayers at that time as appears by the last previous assessment roll of the town.

La Londe v. Barron Co. 80 Wis. 380, 49 N. W. 960, and *State ex rel. Hawley v. Polk Co.* 88 Wis. 355, 60 N. W. 266, are cited to our attention by appellant's counsel as bearing on the question at issue. They dealt with the statute requiring a county board of a county to submit to the voters thereof the question of changing the location of the county seat upon a petition being presented to such board requesting it, signed by a specified proportion of such voters according to the poll lists of the last previous general election in the county. The point decided was that a person who signs such a petition may withdraw therefrom at any time before final action by the board. The question of whether a petitioner's qualification can be tested by a poll list made after he signs the paper

and before presentation of it to the county board was in no wise involved. True, the effect of the decision is that so long as a person's name remains signed to such a petition he is to be regarded as in the attitude of requesting the submission, but the vital question here as to whether qualification to sign can be referred to any circumstance occurring after the signing was not touched upon, and perhaps could not arise, as in this case, because of statutory differences.

Crogster v. Bayfield Co. 99 Wis. 1, 74 N. W. 635, 77 N. W. 167, where the court rejected a view of the law as to municipal aid in the construction of a railroad, which would enable assessors after acceptance by the municipality of a railroad company's proposition on the subject, by the manner of assessing property, to render the bonds to be issued pursuant to such acceptance good or bad, is cited to our attention. There the constitutional provision limiting municipal indebtedness was involved. The particular question presented was this: At what stage in proceedings under the act do municipal-aid bonds in the construction of a railroad become indebtedness within the meaning of sec. 3, art. XI, of the constitution prohibiting municipalities from becoming indebted in excess of "five per centum of the value of the taxable property therein, to be ascertained by the last assessment for state and county taxes previous to the incurring of such indebtedness?" The answer was, at the time of the acceptance of the proposition of the railroad company, not at the time of performance of the contract on its part by constructing the road. It was with reference to the effect of holding the latter date the proper time, leaving the capacity of the municipality to become indebted open and subject to manipulation by the assessors during the period of construction—in effect giving the assessors power to invalidate the obligations of the municipality,—that the court, speaking by the present chief justice, spoke of the danger of such a system and of the importance to the parties to such a contract of their being able to

ascertain with certainty, at the time of entering into the contract, the exact extent of municipal competency to incur indebtedness, regardless of any future act of its officers. If that has any bearing on this case it is quite remote and confined to the mere principle that laws of this character should be certain as to material features and that ambiguities should be solved with a view of rendering them so.

We have now referred to the decisions of this court, in the main, which are discussed in the opinion of the trial court and the briefs of counsel. It is considered that they do not involve the precise question presented here nor throw any satisfactory light upon it, though it must be conceded, as indicated at the outset, that the trial court and counsel succeeded in bringing together the cases which most nearly approach such point. It seems that we must solve the issue as to the law of 1899 by looking at the words thereof in the light of ordinary rules for statutory construction. If there be any precedents fairly in point no one seems to have been able to discover them. We confess that we have not, and although the learned circuit court disposed of the case after much careful study, and counsel upon both sides have devoted commendable industry in endeavoring to aid us, they have not. So far as the authorities go they indicate a strong judicial leaning towards that construction of laws authorizing municipal indebtedness which will make the desire of taxpayers whose property presently will, constructively at least, be incumbered thereby, the ruling factor.

It is conceded that the law in question is ambiguous. The ambiguity grows out of uncertainty as to whether in an application to the chairman of a town board to purchase a road machine the date of his being "petitioned" in the matter is that of the signed paper or that of the presentation thereof to him certified by the town clerk. The words "representing more than one half of the taxable property in such district or in each of such districts (to be ascertained from the last

indicated. One of the cardinal rules for judicial construction is that a meaning which would lead, if adopted, to absurd consequences is to be rejected if any other can be discovered expressed within the reasonable meaning of the language of the act. *State ex rel. Heiden v. Ryan,* 99 Wis. 123, 128, 74 N. W. 544. So far may courts go to avoid attributing to the legislature an intent to enact an obviously absurd law that the literal sense of the words of the enactment, even when there is no uncertainty of expression, may be ignored and a meaning adopted reasonably within the scope of the language used, which will give a sensible effect to the work of the lawmakers. *Rupiper v. Calloway,* 105 Wis. 4, 80 N. W. 916.

Applying the foregoing here it seems that the language, "the chairman of the town board . . . may, upon being petitioned," etc., reasonably points to the time of the certification of the petition for presentation to the chairman, and we are constrained to hold that such was the legislative purpose. To so construe the enactment renders certain the time when the attitude of the taxpayers respecting the purchase of a road machine for a road district, or districts, must be made known to the chairman of the town board and makes that time the one best calculated to inform him of their wishes when he is called upon to act in the matter. The all-important question under the law would seem to be, What are the wishes *in præsenti,* having reference to the time it is sought to burden the district, or districts, with the cost of a road machine, of a majority of the taxpayers thereof representing a majority of the taxable property therein? That according to legislative wisdom is referable to the last previous assessment roll—in this case the assessment roll of 1900. Such construction of the law accords a reasonable meaning to all its parts and gives it the certainty said in *State ex rel. C., M. & St. P. R. Co. v. Blackstone,* 63 Wis. 362, 24 N. W. 72, to be so important as to warrant the court in adopting a quite arbitrary construction, if required, to attain it. We do not find it necessary to go that far here.

The result is seemingly reached by a natural, logical course of reasoning. We must, therefore, differ with the trial court, while commending it for the careful study of the subject evidenced by the record, in the endeavor to reach a correct conclusion.

Error is assigned because the court refused to allow the complaint to be amended by adding thereto a cause of action to recover on the fourth instalment in the note, which matured after the commencement of the action. That presents the question of whether an entirely new cause of action arising *pendente lite* can be brought in, in an action at law under the Code, by amendment. It appears that this court decided in the negative in *Shinners v. Brill,* 38 Wis. 648. The court, speaking by RYAN, C. J., said:

"It would be outside of the doctrine of amendment, and a violation of all principle and precedent, to permit a plaintiff to amend his complaint by setting up a new and distinct cause of action accruing *puis darrein continuance.*"

By the Court.—The judgment is reversed, and the cause remanded with directions to render judgment upon the verdict in favor of the plaintiff.

GLETTLER, by guardian *ad litem,* Respondent, vs. SHEBOYGAN LIGHT, POWER & RAILWAY COMPANY, Appellant.

November 9—December 4, 1906.

Street railways: Motormen: Duties: Negligence: Street crossings: Infant travelers: Personal injuries: Evidence: Motorman performing duties of conductor: Concurrence of two negligent acts: Instructions to jury: Experts: Qualification: Argument of counsel.

1. A motorman in charge of an electric car is required, in the exercise of ordinary care, to keep a proper lookout as to the tracks and streets upon which the car is operated to avoid collision with persons and vehicles on the street.

2. In addition to the duty of a motorman in operating and managing the car and keeping a proper lookout along the track, he must observe the streets adjacent to the track sufficiently to enable him to ascertain whether persons are approaching or are about to approach the track, and, if such persons are in danger of being struck by the car, he must do all that an ordinarily careful and prudent motorman would do to avoid doing injury to such persons.
3. The foregoing principles require a motorman, at a street crossing, to exercise greater care than between crossings, and much more care in case of very young children approaching the track unconscious of an approaching car, or being so circumstanced as to suggest a probability of such unconscious approach, than in case of adults.
4. In an action for personal injuries received by a child four and one-half years old from being run over by an electric car, the evidence, stated in the opinion, is *held* to present a situation such that the motorman could have seen the plaintiff approaching the car at a distance sufficient to have enabled him, by the exercise of ordinary care, to have stopped the car before the collision.
5. Such failure to observe plaintiff is *held* to sustain a finding that the motorman was negligent in not keeping a proper lookout for the child, from which flowed liability for the damage proximately resulting therefrom.
6. If in the management of an electric car the motorman is required to perform the duties of conductor in addition to those of motorman, and an injury results which would not have occurred but for the performance of such additional duties, such management constitutes negligence.
7. In an action for personal injuries received by a child four and one-half years old from being run over by an electric car, it appeared, among other things, that the motorman was performing the additional duties of conductor, and was engaged in looking after the payment of fares when, but for the performance of such additional duties, he could have observed the plaintiff attempting to cross the street. *Held*, that it was proper to submit to the jury the question of defendant's negligence in this respect.
8. Where a defendant is charged with the consequence of two negligent acts, and the result is the natural and probable consequence of their concurrence, it is of no moment which of the two negligent acts was first and which was last in point of time. Under such circumstances the injury inflicted may be said to be the result of the concurrence of the two negligent acts, and to be proximately caused by them.

9. Where the instructions given to the jury on a branch of the case were sufficient and properly covered the case as presented by the evidence, it is not error to fail to instruct the jury on a matter concerning which no special instruction was requested.
10. Instructions to the jury, mentioned in the opinion, are *held* to have clearly informed them of the meaning of proximate cause, and not to have invaded the province of the jury.
11. From the evidence of expert witnesses, stated in the opinion, it is *held* that they were qualified, and that their opinion evidence was competent and proper.
12. Remarks of counsel in argument as to the probable force of the evidentiary facts and the claim predicated thereon by opposite counsel, if prejudicial, were *held* cured by an admonition of the court that it was the province of the jury to determine the weight of the evidence.

APPEAL from a judgment of the circuit court for Sheboygan county: MICHAEL KIRWAN, Circuit Judge. *Affirmed.*

Action for personal injuries received by plaintiff when about four and one-half years of age from being run over by an electric street car of the defendant. A very few minutes before he was injured the plaintiff had been playing with an older boy on New York avenue in Sheboygan, at a point about 150 feet west of Eighth street. Eighth street, running north and south, was traversed by a double track of the defendant company. Plaintiff was first seen by any witness as he was running north by east as rapidly as he could, about ten feet north of the south foot-crossing of New York avenue across Eighth street, and about five feet west of the west track. At a point approximately fifteen or twenty feet north of where he was first seen, and perhaps fifteen feet further east, he was struck by the car going north on the east track. The car of the defendant had no conductor, the motorman being charged with the duty of seeing to the deposit of fares, making change, observing the entry and exit of passengers on the rear platform, and the interior condition of the car, and also of watching for persons desiring to take the car. Although the street was wholly unobstructed in front of him, according to the motorman's testimony, he did not see the

boy until the car had in part passed over the south crossing of New York avenue, at which time the boy was running across the tracks at a point about twenty feet north of him and a little west of the west rail of the east track. The motorman testified that he threw off the power and set his brake, but did not apply the reverse, and that the car ran fifty-five or sixty feet, overtaking and striking the boy. There was evidence that, some passengers having entered at or north of the last street crossing, the motorman, just before reaching New York avenue, turned around and inspected the box in which fares are deposited. The speed of the car, according to different witnesses, was from five to seven or eight miles an hour. The possibility of stopping such a car with the brakes alone at such a rate of speed was given by various witnesses at from fifteen to sixty feet, and at from four to twenty feet by the use of the reverse, provided the reverse was properly applied so as not to blow out the safety fuse. Motions for nonsuit and for direction of a verdict in favor of the defendant were overruled.

By special verdict the jury found (1) that the defendant, by requiring the motorman to perform the duties of motorman and conductor, failed to exercise ordinary care to avoid injuring persons traveling across Eighth street; (2) that the motorman failed to use ordinary care to discover plaintiff while he was in the act of crossing Eighth street ahead of the car; (3) if he had used such ordinary care he would have seen him in time to have stopped the car and to have prevented the injury; (4) that the negligence specified in the first and second questions was the proximate cause of plaintiff's injury; (6) and that those having charge of the plaintiff were not guilty of contributory negligence. Defendant moved for judgment notwithstanding the verdict, for the reversal of the answers to the first, second, third, fourth, and sixth questions, and for judgment upon the verdict so modified; and, in the event of denial of such motions, that the ver-

dict be set aside, and that a new trial be granted—all of which motions were overruled. Upon plaintiff's motion judgment was entered for the amount of the verdict, $8,000, and costs. From this judgment defendant appeals.

For the appellant there was a brief by *Bowler & Bowler* and *Francis Williams,* attorneys, and *William Osgood Morgan,* of counsel, and oral argument by *Mr. E. R. Bowler* and *Mr. Williams.*

For the respondent there was a brief by *Voigt & Voigt,* and oral argument by *Edward Voigt.*

SIEBECKER, J. Motormen in charge of electric cars are required, in the exercise of ordinary care, to keep a proper lookout as to the tracks and the streets upon which the cars are operated to avoid collision with persons and vehicles on the street. In addition to his duty of operating and managing the car and keeping a proper lookout along the track, he must observe the streets adjacent to the track sufficiently to enable him to ascertain whether persons are approaching or are about to approach the track, and, if such persons are in danger of being struck by the car, he must do all that an ordinarily careful and prudent motorman would do to avoid doing injury to any such person.

"Obviously, those principles require a motorman at a street crossing to exercise greater care than between crossings, and much more care in case of very young children approaching the track unconscious of an approaching car, or being so circumstanced as to suggest a probability of such approach, than in case of adults." *Forrestal v. Milwaukee E. R. & L. Co.*, 119 Wis. 495, 97 N. W. 182; *Anderson v. Minneapolis St. R. Co.* 42 Minn. 490, 44 N. W. 518.

If the situation here presented is such that the motorman could have seen the plaintiff approaching the car at a distance sufficient to have enabled him, by the exercise of ordinary care, to have stopped the car before the collision, then his failure to observe plaintiff cannot relieve the company

from liability for the damage proximately resulting therefrom. Appellant strenuously urges that the evidence fails to present a situation from which the jury could infer that the motorman omitted to exercise the care required of him at the time of the accident to avoid running against the plaintiff. In this contention it is claimed that the evidence permits only of the inference that, from the time the plaintiff could have been seen approaching the tracks within the field of observation of the motorman, the car could not have been stopped before the accident. An attentive reading of the case does not sustain this view. It appears that the street was wholly unobstructed at the crossing and in the vicinity of the accident. That the motorman had a view of all the street crossing within the limits of the boundaries of Eighth street as he approached New York avenue cannot be questioned. There is testimony tending to show that as the car approached or was near the south foot-crossing of the avenue the plaintiff was within the limits of Eighth street and was running rapidly north by east toward the place where the accident occurred, somewhere from fifty to sixty feet from the car. We find no support for the claim that it is shown that the child's presence within the course it followed was not necessarily within the field of the motorman's view as he approached and proceeded onto New York avenue and thence north toward the place where he struck the plaintiff. It also appears that plaintiff must have been from fifty to sixty feet distant when he could first have been observed by the motorman. The inquiry, therefore, is whether the motorman could have stopped the car by applying the brake in the usual manner within this distance. The speed of the car, according to the evidence, did not exceed seven to eight miles an hour, and it is said to be possible to stop a car running at this speed in from fifteen to sixty feet. This furnishes the field within which it was for the jury to find the ultimate fact as to this issue. They have answered the inquiry in response to a special question

under the instruction of the court. Their finding cannot be disturbed for want of evidence to support their conclusion, and the finding that the motorman was negligent in not keeping a proper lookout for the child is fully sustained.

Error is assigned upon the verdict finding that defendant was negligent in requiring the motorman on this car to perform the duties of conductor in addition to those of motorman. In the case of *Dahl v. Milwaukee City R. Co.* 65 Wis. 371, 27 N. W. 185, it was held that if street-car drivers were required to perform duties in addition to those required of them as drivers which materially interfered with their duty to prevent accidents by keeping a proper lookout for people approaching the track, and if it appeared that an injury resulted which would not have occurred but for the performance of such additional duties, then such management of the business constituted negligence. There is no dispute but that the motorman of this car performed the additional duties of conductor. There is some evidence tending to show directly that the motorman was engaged in looking after the payment of fares when he should have observed the plaintiff attempting to cross the street. Other facts and circumstances regarding the conduct of the business are corroborative of the fact that imposing the conductor's duties upon the motorman interfered with his performance of his duties as motorman. This evidence made the question of defendant's negligence in this respect a proper inquiry for submission to the jury. It was further found that the negligence of the defendant in not keeping a proper lookout, and the negligence of imposing conductor's duties on the motorman, were the proximate causes of plaintiff's injury. This is claimed to be error, because it was not ascertained to which of the two grounds of negligence found the accident was attributable. It seems apparent that the jury found that both acts of negligence shared in producing the result. Since defendant is charged with the consequence of both negligent acts and the result is the nat-

ural and probable result of their concurrence, it is of no moment which of the two negligent acts was first and which was last in point of time. The finding in effect is that the injury would not have resulted but for defendant's negligence, and that both negligent acts shared in producing the result. *Kraut v. F. & S. P. C. P. R. Co.* 160 Pa. St. 327, 28 Atl. 783; *McCoy v. Milwaukee St. R. Co.* 88 Wis. 56, 59 N. W. 453; *Grant v. Keystone L. Co.* 119 Wis. 229, 96 N. W. 535. Under such circumstances the injury inflicted may be said to be the result of the concurrence of the two negligent acts, and to be proximately caused by them.

Appellant's contention that the court erred in not instructing the jury specially that, if the plaintiff suddenly and unexpectedly attempted to cross the track, then such conduct would be the proximate cause, is answered by the finding of fact in the special verdict, and the evidence supporting it, that the motorman could have seen him approaching. It appears that plaintiff pursued a continuous course from the time he was seen on the street, that he approached from the southwest corner of Eighth street and the avenue, and thence proceeded northeast to where he was struck by the car. This shows that the motorman would obviously have been apprised of his approach to the track had he exercised due care in observing this part of the street. Appellant did not specially request such instruction. If it deemed it necessary and proper such request should have been made in writing. The instructions given upon this branch of the case were sufficient, and properly covered the case as presented by the evidence. Further criticism is made of that part of the court's charge to the jury stating that if the jury found the defendant guilty of negligence in the conduct of the business, in requiring the motorman to perform the duties of conductor, then it remained to be determined whether it was "a proximate or the proximate cause" of the injury to plaintiff. In connection with this instruction the court correctly defined to the jury

what constitutes proximate cause in the law of negligence, which clearly informed them of the meaning of the language excepted to. Nor do we find any ground for the objection that the court improperly invaded the province of the jury and informed them what the evidence established as the proximate cause of the accident. The instructions were free from any suggestion of what facts the evidence established as regards the issues submitted to the jury. Exceptions are argued as to the qualification of a witness testifying to the speed of the car, and as to the competency of the evidence of a witness testifying to the distance within which a car could be stopped. From an examination of these exceptions we are convinced that the witnesses who testified to the speed of the car were qualified, and that the opinion evidence giving the distance within which the car could be stopped was competent and proper. The contention that appellant was prejudicially affected by improper remarks of respondent's counsel in his comments on the case before the jury is not borne out by the record. The remarks excepted to were made in argument as to the probable force of evidentiary facts and the claim predicated thereon by appellant's counsel. The court admonished the jury, in response to the objection, that it was their province to determine the weight of such evidence, and this excluded the inference that counsel's characterization of the evidence was given controlling weight by them. We deem that this was sufficient to remove any probability that the jury had been prejudiced by such remarks.

These considerations cover all the material questions presented by the record and call for affirmance of the judgment.

By the Court.—Judgment affirmed.

CURKEET, Respondent, vs. STEINHOFF and others, Appellants.

November 10—December 4, 1906.

Trial: Special verdict: Specific finding: Payment: Interest: Costs: Banks as collecting agents: Authority.

1. On the facts, stated in the opinion, it is *held* that it was proper for the court, as part of a special verdict, to take the jury's finding as to a specific fact, although such finding was involved in the issue covered by another question of the special verdict.
2. A controversy having arisen as to the exact amount due plaintiff on a sale, plaintiff refused to accept the sum which was offered him as payment in full for the property purchased. Thereafter plaintiff drew on defendants through a bank for the amount he claimed, with instructions to the banking officers to receive no amount in payment of such draft other than the sum specified therein. Defendants appeared and left with the bank the sum previously offered, which was received and retained by the bank and offered to plaintiff, who refused to accept it as payment for his claim, and brought suit for the full amount claimed. *Held:*

   (1) Defendants' deposit did not constitute payment of plaintiff's claim *pro tanto*.

   (2) Plaintiff was entitled to recover in the action the full amount of his claim and interest, with costs.
3. From the authority given a bank by receiving a draft for collection there arises no implication of authority other than to obtain payment in full. Any implied authority to accept part payment is excluded.

APPEAL from a judgment of the circuit court for Grant county: GEORGE CLEMENTSON, Circuit Judge. *Affirmed.*

On February 26, 1902, plaintiff held an auction at his farm in the town of Elk Grove, Lafayette county, and at such sale defendants bid off certain personal property, to be paid for in cash at the time of the sale. Included in the property bought by the defendants was a group of heifers. There is no dispute as to the other property bought by them, but they claim that the group of heifers which they bought

contained eight animals, and that a certain dark red heifer with a star in the forehead was included among them. The sale of the cattle was conducted as follows: The cattle were taken from sheds by plaintiff's assistants in groups as they were wanted. The group was driven through a gate into the inclosure where the sale was held. This gate was then closed and the group in the inclosure was auctioned off. After they were sold the group was driven into a pasture through a gate at the opposite side of the inclosure from the sheds. This pasture gate was closed before another group was taken from the cattle sheds into the sale ring. In the early part of the cattle sale a group of two animals was disposed of to one John Huntington at $37 per head. This group was then driven into the pasture. Several sales intervened between the sale to John Huntington and the driving into the ring of the group of heifers which defendants purchased. Defendants claim that this group contained eight heifers, and that the dark red heifer with the star in the forehead was among them. Plaintiff claims that the group contained but seven heifers, and that the dark red heifer with the star in the forehead was not among them, but had been sold as one of the group of two head to John Huntington. Defendants bid in the group at $24.50 per head. A few days after the sale one of the defendants came to plaintiff's farm to settle for the property purchased by them, and then claimed that the red heifer was among their purchase of heifers. Plaintiff denied this and refused to settle with defendants by allowing them what they demanded, namely, the difference between the sale price of the dark red heifer and the price per head at which the defendants had bid in the group of heifers. The heifers were thereafter delivered to defendants but not paid for on delivery. The total amount claimed by plaintiff for all the property sold to defendants at the auction was $435. This included seven heifers at $24.50 per head. On March 31, 1902, plaintiff drew by bank draft on defendants for $435

and instructed the bank not to receive less than the face of the draft. On its being presented to defendants for payment they offered $417.50 as payment in full of the draft. The difference of $17.50 was made up of $12.50, the difference between the amount for which the red heifer had been sold to Huntington, and $24.50, the price per head at which the defendants had bid in the group of heifers, and $5, claimed by defendants as their expense for having been compelled to go a second time to obtain their purchases. Plaintiff refused to receive this amount, and it has been in the bank since then. Plaintiff brought this action to recover the amount due him from defendants. His claim included $5 for keeping the stock from the time of the sale until taken away by defendants. On the trial the court submitted certain questions to the jury to be answered by them as a special verdict. The questions and the answers of the jury thereto are as follows:

"(1) Was the large dark red heifer with the star in the forehead, which was one of the eight heifers the plaintiff owned at the time of his sale, sold, at the time the cows were sold, to John Huntington, and turned from the sale yard into the pasture before *Stephens* bid upon the bunch of heifers that were turned into the sale yard? *A.* Yes. (2) How many heifers were there in the sale ring at the time *Mr. Stephens* bid off the lot at $24.50 per head? *A.* Seven (7). (3) How much, if anything, ought the plaintiff to recover from the defendants for keeping the live stock *Mr. Stephens* had bid off, from the time of the sale on Wednesday to the following Saturday morning, when *Mr. Stephens* took the stock away? *A.* Nothing. (4) Did the defendant *Steinhoff* when, on or about March 31, 1902, he went to the First National Bank in Platteville, deliver to Mr. Hetherington, the cashier of the bank, $417.50 to be unconditionally and absolutely given to the plaintiff upon the debt of the defendants to him? *A.* Yes."

The finding of the jury on the question of partial payment was disregarded by the court, and, upon the facts shown, it was held that no partial payment had been made. Judgment

was awarded in favor of plaintiff for $435, with interest from March 31, 1902, and for costs. This is an appeal from such judgment.

T. L. Cleary, for the appellants.

For the respondent there was a brief by *Orton & Osborn* and *J. W. Murphy,* and oral argument by *C. F. Osborn.*

SIEBECKER, J. It is averred that the submission of the first question in the special verdict was prejudicial error, because the inquiry propounded did not cover an issue raised by the pleadings, and its submission was confusing and misleading to the jury. It appears that the main controversy turned upon the question of whether there were seven or eight heifers in the group brought into the sale ring and sold to defendants. True, this issue is fully covered by the second question of the special verdict. It appears, however, that this controversy arose over the disputed claim of the parties to the heifer described and specified in the first question; it being averred and claimed by defendants that this particular animal was of the group, eight in number, which they purchased, while plaintiff asserted that it was not one of this group, but that it had been sold to Huntington before defendants purchased. This situation presented the inquiry as to whether this particular animal had actually been sold to Huntington and kept separate from the group defendants purchased, and made it one of the vitally litigated facts in the case, and one which the jury must have specifically ascertained to enable them to answer the second question of this verdict. Under such circumstances it was proper for the court to take the jury's specific finding as to this fact, though such finding was involved in the issue covered by the second question. We do not discover that this procedure misled or confused the jury. *Mauch v. Hartford,* 112 Wis. 40, 87 N. W. 816.

Appellants next urge on our attention the claim that the

court improperly allowed plaintiff his costs in the action. This question, however, will depend upon whether the court correctly held that defendants had not made a payment of $417.50 on plaintiff's claim for the property purchased from him at the auction sale. The jury found that such payment had been made, but the court disregarded such finding, evidently upon the ground that the undisputed facts showed that such payment had not been made. It appears that when defendants called for the delivery of the property they had purchased from plaintiff, the parties disagreed as stated, and plaintiff refused to accept the sum of $417.50 which was offered to him as payment in full for the property defendants had actually purchased. Defendants thereafter, without paying the sum due plaintiff, received all of the property they claimed except the animal in dispute. Some days after such delivery the plaintiff, through the First National Bank of Platteville, drew on defendants for the sum of $435, the amount he claimed for the property delivered to defendants, with instructions to the banking officers to receive no amount in payment of such draft other than the sum specified. Defendants appeared at the bank and left the sum of $417.50. This was received and retained by the bank and offered to plaintiff in payment of the draft, but he refused to accept it as payment of his claim and therefore declined to receive it. The contention of defendants is that this transaction through the bank constitutes payment of plaintiff's claim to the extent of the amount so left with the bank and limits the amount of plaintiff's recovery under the verdict to $17.50. We do not find such to be the consequences of this transaction for the collection of plaintiff's claim. The bank as collecting agent for plaintiff was given no authority to receive part payment, but was specifically instructed to receive nothing except the full amount of the draft. Plaintiff's attitude in the matter had been brought to defendants' notice by his repeated refusals to accept an offer of any sum less than the

full amount claimed. The contention that the court erred in not following the finding of the jury, to the effect that payment to the bank under the circumstances was a discharge of plaintiff's claim to the amount received by the bank and left only a balance of $17.50 due from them when the action was commenced, is not sustained. It is apparent that the bank had no authority to receive part payment of the debt. As stated, the bank had been expressly instructed to that effect. It could not disregard such instructions and accept part payment of the debt. But, were the case devoid of such specific instructions to the bank, still we find no basis on which defendants could claim this to be a partial payment of the claim. It is undisputed that the bank's authority arose out of the fact that the draft was placed in its custody as plaintiff's collecting agent. From the authority so given arises no implication of authority other than to obtain payment in full, and any implied authority to accept part payment is excluded. Selover, Bank Collections, § 44; 5 Cyc. 505; *Lowenstein & Bros. v. Bresler,* 109 Ala. 326, 19 South. 860; *Capital State Bank v. Lane,* 52 Miss. 677; Story, Agency (9th ed.) § 98. The court properly determined that the undisputed evidence showed that no part of the debt had been paid by defendants, and the jury's finding on this subject must be disregarded. From this it results that plaintiff was entitled to recover in the action the full amount of his claim with interest thereon from the time it was due and his costs of the action.

An examination of the exceptions urged to the reception of evidence over objection and to the court's conduct in asking witnesses questions shows that the evidence objected to was competent and material, and that the court properly propounded the questions to the witnesses in the case.

We discover no prejudicial error in the record.

By the Court.—Judgment affirmed.

STATE EX REL. SULLIVAN, Respondent, vs. DRAKE, Appellant.

November 10—December 4, 1906.

Certiorari: *Parties: Right to writ: Petition: Sufficiency of allegations: Quashing the writ.*

1. Only a party to the proceeding sought to be reviewed, or one directly affected by it, can prosecute a writ of *certiorari*.
2. Where one not a party seeks to use the writ of *certiorari*, he must show that the decision sought to be reviewed is directed against him or his property in the sense that the enforcement of the decision would involve special, immediate, and in effect a direct injury to his interests.
3. A petition for a writ of *certiorari* by the widow of a party against whom a justice of the peace rendered judgment, with no allegation that her husband left any property, or that the relator was interested in any property which could or would be in any way affected by the judgment, is barren of any facts to show that the relator is in any way interested in setting aside the judgment.
4. In such case a motion to quash the writ of *certiorari* should have been granted.

APPEAL from a judgment of the circuit court for Iowa county: GEORGE CLEMENTSON, Circuit Judge. *Reversed.*

Certiorari to review a judgment of a justice of the peace of Iowa county.

For the appellant there was a brief by *Elmore T. Elver,* and oral argument by *F. M. Miner.*

For the respondent the cause was submitted on the brief of *Thomas W. King* and *Richard Carter.*

KERWIN, J. On the 3d day of January, 1905, judgment was entered in favor of *Walter Drake,* appellant, and against one Daniel Sullivan, in a justice's court of Iowa county, Wisconsin. The defendant in said action, Daniel Sullivan, died on the day judgment was entered, and his widow, *Mrs. Sullivan,* petitioned the circuit court for Iowa county for a writ of *certiorari.* The relator alleges, in effect, the rendition of the judgment before the justice for $30.47 damages, together

with costs; that petitioner is advised, informed, and believes that the judgment was rendered and entered by the justice without any jurisdiction to render the same, to the damage of petitioner; that Daniel Sullivan died on the day judgment was rendered, and that petitioner is his widow; that the judgment is void for the reason that it appears from the docket of said justice that on the return day of process, December 27, 1904, the plaintiff and defendant appeared, and before the parties had joined issue, and without any complaint having been made on the part of the plaintiff or answer on the part of the defendant, and without the consent of the parties, the justice, upon application of the plaintiff, adjourned the case to January 3, 1905, contrary to sec. 3625, Stats. 1898. The return of the justice to the writ of *certiorari* shows substantially the same facts as alleged in the petition respecting the proceedings of the justice in the action. The appellant moved to quash the writ. The court below after hearing the motion refused to quash, and ordered the judgment of the justice of the peace reversed.

The only question for consideration upon this appeal is whether the motion to quash the writ should have been granted. This involves the question whether the petitioner, *Mrs. Sullivan,* who was not a party to the record, was entitled to the writ. It is well settled that only a party to the proceeding sought to be reviewed, or one directly affected by it, can prosecute the writ. Where one not a party seeks to use the writ he must show that the decision sought to be reviewed is directed against him or his property in the sense that the enforcement of the decision would involve special, immediate, and in effect a direct injury to his interests. *State ex rel. Milwaukee Med. College v. Chittenden,* 127 Wis. 468, 107 N. W. 500; Harris, Certiorari, § 2; *Ashe v. Colusa Co.* 71 Cal. 236, 16 Pac. 783; *Judd v. Fox Lake,* 28 Wis. 583; *Pedrick v. Ripon,* 73 Wis. 622, 41 N. W. 705; *West v. Ballard,* 32 Wis. 168; 6 Cyc. 768; *Tallon v. Hoboken,* 60 N. J. Law,

212, 37 Atl. 895; 2 Spelling, Extr. Rem. § 1977; *Starkweather v. Seeley,* 45 Barb. 164; *Wilson v. Remley,* 106 Iowa, 583, 76 N. W. 843; *Davis Co. v. Horn,* 4 G. Greene (Iowa) 94; *Watson v. May,* 6 Ala. 133; *Wolpert v. Newcomb,* 106 Mich. 357, 64 N. W. 326; *Strong v. Co. Comm'rs,* 31 Me. 578; *People ex rel. Finch v. Overseers,* 44 Barb. 467; *Roy v. Whitaker,* 92 Tex. 346, 49 S. W. 367; *State ex rel. Skogstad v. Anderson, post,* p. 227, 109 N. W. 981.

There is nothing whatever in the record showing that the relator had any interest in the reversal of the judgment sought to be reviewed, or was injuriously affected by it. There is no allegation that Daniel Sullivan left any property, or that the relator was interested in any property which could or would be in any way affected by the judgment. The record is entirely barren of any facts going to show that *Mrs. Sullivan* was in any way interested in setting aside the judgment. In order to entitle her to the writ it was necessary to show that the enforcement of the judgment would "involve special, immediate, and in effect at least a direct injury" to her interests. *State ex rel. Milwaukee Med. College v. Chittenden, supra.* It is very clear from the record that the petitioner made no case entitling her to the writ, therefore the motion to quash it should have been granted.

By the Court.—Judgment of the court below is reversed, and the cause remanded with instructions to quash the writ of *certiorari.*

FOGO, Appellant, vs. BOYLE and others, Respondents.

November 10—December 4, 1906.

Findings of fact, what constitute: Appeal and error: Review in absence of findings: Evidence: "Timber:" Injunction.

1. A record containing what is therein called "findings of fact," which are at most mere conclusions that the plaintiff cannot recover, and hence that defendants are entitled to costs, does

not show compliance with sec. 2863, Stats. 1898, and such failure to determine the issues litigated justifies a reversal and new trial, unless it can be said that the judgment is supported by a preponderance of the evidence.

2. The meaning of the word "timber" has more or less flexibility, depending upon time, place, and circumstances, as well as the language of the instrument in which it is employed.

3. Under a contract conveying "all the timber" on the land described, the same to be removed by a certain date, the evidence, stated in the opinion, is *held* to sustain a judgment denying an injunction to restrain the cutting of standing saplings, small trees, or any other trees more suitable for cord wood, fire wood, pole wood, or underbrush than for timber.

APPEAL from a judgment of the circuit court for Richland county: GEORGE CLEMENTSON, Circuit Judge. *Affirmed.*

A. C. Vaughan, for the appellant.

For the respondents the cause was submitted on the brief of *L. H. Bancroft.*

CASSODAY, C. J. This action was commenced December 8, 1904, to restrain the defendants from cutting or removing from the premises therein described standing saplings, small trees, or any other trees more suitable for cord wood, fire wood, pole wood, or underbrush than for "timber." It is conceded that the plaintiff became the owner of the land described May 9, 1904, under and by virtue of a deed executed by the owners and heirs at law of one Foley, then deceased, subject, however, to a written contract made and executed by the said Foley and the defendant *Bart Boyle,* January 23, 1904, wherein and whereby the said Foley, since deceased, agreed to sell to the said *Bart Boyle* "all the timber" on the land described, the same to be removed by March 1, 1906, in consideration of $115 to be paid by the said *Bart Boyle* to the said Foley. It further appears that May 16, 1904, the said *Bart Boyle,* for value received, sold and assigned said written contract and all his right, title, and interest in the property thereby conveyed to the defendant *Henry Palmer.* It also

appears that November 29, 1904, the said *Henry Palmer,* for value received, sold and assigned said written contract and all his right, title, and interest in the property covered by that contract to the defendant *John Boyle.* Each of said defendants justifies such cutting and removal under and by virtue of said written contract. At the close of the evidence the court overruled the plaintiff's motion to strike out all of the parol testimony, and "found for the defendants and $1 damages for the injunction." Thereupon the court made and filed what are therein called "findings of fact and conclusions of law," wherein the court "found for the defendants that said action was not properly brought and that the prayer of the plaintiff should be denied and the injunctional order . . . be dissolved, and that the defendants have their costs and disbursements herein," and ordered judgment accordingly. Thereupon the court ordered and adjudged that the complaint be dismissed and the injunctional order be dismissed and dissolved, and that the defendants have and recover from the plaintiff their costs and disbursements, taxed and allowed at $55.31. From such judgment the plaintiff appeals.

The statute provides that "upon a trial of a question of fact by the court its decision shall be given in writing and filed with the clerk," and that such decision shall state separately "the facts found" and the "conclusions of law thereon." Sec. 2863, Stats. 1898. Such requirement is not only to show what was really adjudicated, but also to facilitate a review on appeal. The question here at issue was whether the words "all the timber" on the lands described covered and included standing saplings, trees, or other trees more suitable for cord wood, fire wood, pole wood, or underbrush. Much of the parol testimony on the part of the plaintiff as well as on the part of the defendants related to the meaning of the word "timber," as thus used. The court refused to strike out such parol testimony, apparently, because it was pertinent to such issue. But, as indicated, the court failed

to determine such issue. What are called "findings of fact" are at most mere conclusions that the plaintiff could not recover, and hence that the defendants were entitled to costs. Such failure to determine such issue would, under recent and repeated decisions of this court, justify a reversal and a new trial, unless we can say that the judgment is supported by a preponderance of the evidence. *Brown v. Griswold,* 109 Wis. 275, 280, 85 N. W. 363; *Bostwick v. Mut. L. Ins. Co.* 116 Wis. 392, 440–444, 89 N. W. 538, 92 N. W. 246; *Farmer v. St. Croix P. Co.* 117 Wis. 76, 93 N. W. 830; *McKenzie v. Haines,* 123 Wis. 557, 102 N. W. 33; *Sliter v. Carpenter,* 123 Wis. 578, 102 N. W. 27. As indicated in the adjudicated cases, the meaning of the word "timber" has more or less flexibility, depending upon time, place, and circumstances, as well as the language in which it is employed. 8 Words & Phrases, 6972, 6973. In Maine it has been said not to be a strained construction to hold that ordinarily a grant of growing timber is to be construed most favorably to the grantee, so as to convey the growth named with its increase, until the time for its removal shall have elapsed. *Donworth v. Sawyer,* 94 Me. 242, 47 Atl. 521. In the same case it is said that "the construction to be given to deeds must have relation to the time and circumstances under which they were given." 94 Me. 252, 47 Atl. 523. In a case in a federal court in Florida it was held that "the term 'timber,' as used" in the statute prohibiting the cutting of live oak and red cedar trees and other timber, "does not apply alone to large trees fitted for house or ship building, but includes trees of any size of a character or sort that may be used in any kind of manufacture or the construction of any article," and that the cutting could not be justified by using the trees for fire wood or burning them into charcoal. *U. S. v. Stores,* 14 Fed. 824, 825. After quoting from Webster's Dictionary, it is there said that "with so many peculiar significations, the intended meaning of the word usually depends upon the con-

nection in which it is used or the character of the party making use of it." Under the same federal statute a similar conclusion was reached by the supreme court of Arizona, where it was also held that "the question of whether or not mesquite is timber must necessarily be one of fact, dependent upon the character of the wood charged and shown to have been cut or removed in each particular case, and is not a question which can properly be determined upon a demurrer to the indictment." *U. S. v. Soto,* 7 Ariz. 230, 64 Pac. 419. In this state it has been held that the word "timber," as used in the lien statutes, "includes railroad ties." *Kollock v. Parcher,* 52 Wis. 393, 398, 399, 9 N. W. 67. It was there said that such statute should be liberally construed. The Century Dictionary gives seven definitions. Among them we find: "(2) Growing trees, yielding wood suitable for constructive uses; *trees generally;* woods. . . . (4) Stuff; material. (5) A single piece of wood, either suitable for use in some construction or already in such use."

It appears from the evidence on the part of the plaintiff that, before completing the purchase of the land, he was shown and read over the written contract made nearly four months before, wherein Foley had sold "all the timber on" the land to *Bart Boyle,* and was told that he must take the land subject to that contract, and he then said: "Yes, this contract calls for all the timber;" that he understood that *Boyle* had a right to cut the timber on that land. On the part of the defendants there is evidence tending to prove that the plaintiff knew of the *Boyle* contract before he bought the land, and had read the same and saw *Boyle* cutting wood and timber and everything; that in buying the land the plaintiff said he did not get the timber; that the timber had been disposed of; that he thought it was as well or better for him because the land was worth more cleared than with the timber on; that in that conversation the plaintiff asked *Boyle* if he would leave some trees down by the road for shade and *Boyle* told him that he would. A witness who had lived long in the country and had dealt

considerably in lands in the county testified that "timber" on land lying adjacent to Richland Center, in his judgment, included cord wood; that in that vicinity nearly all the timber land had been culled and the saw logs taken off, and the word "timber" would certainly include cord wood.

After careful examination of the record and with considerable hesitation, we must hold that the judgment is sustained by a preponderance of the evidence, notwithstanding the absence of findings. In reaching this conclusion we are influenced to some extent by the fact that the plaintiff is not only seeking to reverse the judgment of the trial court, but is also invoking the equity powers of the court to grant an injunction, which certainly rests in the sound discretion of the court.

By the Court.—The judgment of the circuit court is affirmed.

STATE EX REL. LIMMIX and another, Appellants, vs. SUPERVISORS OF THE TOWN OF CLYDE, Respondents.

November 10—December 4, 1906.

Highways: Establishment: Prior application: Validity: Location: Variation from route in application: Joint meeting of town boards.

1. Under the limitation of sec. 1283, Stats. 1898 (providing that the determination of the supervisors of any town in refusing to lay out any highway shall be final for the term of one year after making of such determination, and that no application for laying out any such highway shall be again acted upon within said term of one year), the first application must have been a valid application—one upon which a legal highway could be laid out.
2. On *certiorari* to reverse the action of a town board in laying out a highway, one ground alleged was that a previous application had been made to lay out the same highway, which had been denied within one year prior to action on the instant application. It appeared from the return that petition and notice of meeting under the first application had described the proposed highway as commencing at the intersection of a designated road and the "north line of the southeast quarter of the *north-*

east quarter" of a certain section; that the starting point in the second application was the intersection of the same designated road and the "north line of the southeast quarter of the *northwest* quarter" of the same section; that the designated road ran along the west line of the southeast quarter of the *northwest* quarter of such section, but nowhere touched the *northeast* quarter, and that the first application was denied because of this defect in the petition and notice. *Held*, that the petition and notice were jurisdictional papers in an adversary proceeding, must substantially comply with the calls of the statute in order to authorize action by the town board, and, although a careful reading of the application and notice might induce one to believe a mistake had been made in naming the quarter section, that the supervisors had no jurisdiction to lay out the highway in question under the first application and notice.

3. In such case the refusal of the town board to act under the first application and notice did not amount to a refusal to lay out the highway or a decision against the application under either sec. 1269 or sec. 1283, Stats. 1898.
4. Where the location of a highway as laid out varies from the route proposed in the application and notice, but the variation is not so great as to make it a materially different highway, in the absence of any showing to the contrary it will be presumed that the variation was reasonable and required by the interests of the public.
5. At the time fixed in the notice of hearing upon an application to the town board of C. to lay out a highway which would connect with one proposed to be laid out in the adjoining town of W., the town board of C. met and held a joint meeting with the town board of W. On *certiorari* to review the order laying out the proposed highway the record simply stated that the two boards met together to consider the application, and did not show that action was taken by the joint body, but on the contrary stated that after such consideration the road in question was laid out by the town board of C. *Held*, that a judgment of affirmance of the action of the town board of C. was right.

APPEAL from a judgment of the circuit court for Iowa county: GEORGE CLEMENTSON, Circuit Judge. *Affirmed.*

For the appellants there was a brief by *James E. O'Neill, Richard Carter,* and *Fiedler & Fiedler,* and oral argument by *E. C. Fiedler.*

J. P. Smelker, for the respondents.

WINSLOW, J. This is an action of *certiorari* brought to reverse an order of the defendant supervisors laying out a highway, and the relators appeal from the judgment affirming the order of the supervisors. Three contentions are made by appellants which will be briefly considered.

1. It is claimed that a previous application to lay out this same highway was denied by the supervisors within one year prior to action upon the present application, and hence that, under sec. 1283, Stats. 1898, the supervisors had no power to lay out the highway. If the fact be as claimed the conclusion undoubtedly follows, but the previous application must of course be a valid application, *i. e.* one upon which a legal highway could be laid out. It appears by the return that the alleged previous application described the proposed highway as commencing in the center of a certain highway in the town known as the Dodgeville road, "where it crosses the north line of the southeast quarter of the *northeast* quarter" of section 7, and that the notice of the meeting of the supervisors to decide upon such application stated that they would meet at the starting point of the proposed highway as so described. It further appears that the starting point of the highway, as prayed for in the second application and as actually laid out, was described as a point "in the Dodgeville road on the north line of the southeast quarter of the *northwest* quarter of section 7." The Dodgeville road runs north and south on the west line of the southeast quarter of the *northwest* quarter of section 7, and nowhere touches the *northeast* quarter. So the first application named as the starting point of the proposed highway not only a point which had no existence, but which, if it had existence, must be at least half a mile distant from the starting point of the highway proposed to be laid out under the second application. It appears by the record returned that the supervisors declined to act on the first application because of this defect in the petition and notice. The appellants now claim, however, that

it was clearly apparent by the description of the proposed highway in the first application and the courses and distances that the word "northeast" was mistakenly inserted for "northwest," that the mistake could deceive no one, and hence that the petition and notice were sufficient to enable the supervisors to act thereon and lay out substantially the highway which they did finally lay out under the second application. We have been unable to take this view. The petition and notice are jurisdictional papers in an adversary proceeding. They must substantially comply with the statute in order to authorize action by the supervisors. All parties interested adversely to the proceeding had a right to demand that the notice should plainly state where the supervisors would meet to consider the application. A notice that the meeting was to be held in a quarter-section half a mile distant from the actual meeting place cannot be safely regarded as a compliance with this requirement, even though it be possible that careful reading might induce one to believe that a mistake had been made in the naming of the quarter-section. We think, therefore, that the supervisors had no jurisdiction to lay out the highway in question under the first application and notice, and hence that their refusal to act thereon did not amount to a refusal to lay out the highway or a decision against the application under either sec. 1283 or sec. 1269, Stats. 1898.

2. It appears that the highway as proposed in the second application was to cross in an irregular course three forty-acre tracts in the town of *Clyde* and then connect with another proposed highway in the adjoining town of Wyoming, as to which proceedings to lay the same out were pending at the same time, so as to make a continuous road. The supervisors decided not to follow the proposed course through the middle forty-acre tract, but varied it a considerable distance to the north, and it is claimed that they had no power to make this variation. This court held in *Neis v. Franzen,* 18 Wis. 537, that upon an application to alter a highway the

supervisors are not necessarily confined to the precise route named in the application, but might, if satisfied that the public interests so required, make a reasonable variation from such proposed route. The same principle has been applied to a proceeding to lay out a drain with the proviso attached that the variation shall not depart so far as to constitute materially another and different line. *Donnelly v. Decker,* 58 Wis. 461, 17 N. W. 389. The change here was not so great as to constitute the highway actually laid out a materially different highway from that named in the application. In the absence of any showing to the contrary it must be presumed that the variation was reasonable and required by the interests of the public.

3. It appears by the record that at the time fixed in the notice the supervisors met at the place fixed in the notice and held a joint meeting with the supervisors of the town of Wyoming to consider such application and that afterwards they decided to lay out the highway. It is said that the statute does not authorize a joint meeting, and that the fact that such a meeting was held vitiates the proceeding. It is true there is no statute authorizing the two boards to meet jointly. Had it appeared that the two boards acted as one body in deciding the application there would be grave doubt whether the decision could be sustained, because the town board of the town of *Clyde* alone has the power to lay out the highway. But it does not so appear. The record simply states that the two boards met together to consider the application. This was natural, because proceedings were then pending to lay out the balance of the proposed highway in the town of Wyoming, and, unless that was also laid out, the highway in the town of *Clyde* would be of no value. It was entirely proper for the defendant supervisors to ascertain whether the Wyoming part of the highway was in fact to be laid out, and it seems quite obvious that this was the purpose of the joint consideration. The record does not, however, show that action was taken by

the joint body. On the contrary, it states that after such consideration the road was in fact laid out by the town board of the town of *Clyde*. The judgment of affirmance was therefore right.

By the Court.—Judgment is affirmed.

DUNHAM and others, Appellants, vs. SALMON and others, Respondents.

November 10—December 4, 1906.

Sales: Warranties: Fraud: Rescission: Principal and agent: Authority to make warranties: Evidence: Witnesses: Cross-examination: Impeachment: Materiality: Appeal and error: New trial on reversal.

1. In an action for the price of a stallion transferred by a formal bill of sale containing a special warranty and a stipulation that, on failure of the warranty, plaintiffs would furnish another stallion of *equal quality* in exchange upon the return of the stallion in question, there was interposed an answer alleging breach of warranty and of fraud in the sale, but there was neither pleading nor proof that the stallion had ever been returned or that defendants had ever offered to return it. *Held*, that the trial court rightly ruled that the question of fraud was not in the case.
2. In such case no breach of the written warranty was shown, since it only bound the plaintiffs to furnish another stallion upon condition of the return of the one sold.
3. In an action on a joint and several note given by numerous defendants for the purchase price of a stallion, there was pleaded a breach of warranty. There was evidence of a special written warranty which had not been breached because of failure of defendants to comply with its conditions, and there was also an attempt to prove an oral warranty by the plaintiffs' agent. The jury found the making of such oral warranty and its breach. *Held*, that the jury's findings were not justified in the absence of proof that the oral warranty was made to each one of the defendants.

4. In such case, even though the evidence tended to show that the agent made such oral warranty to each and all of the defendants, the defendants could not succeed without showing that the agent had express authority from his principal to make such warranty, or that such sales were usually attended with such a warranty.
5. Where several subscribers in buying a stallion understood that the talks each had with the agent of the sellers were merely tentative, that the transaction was only to be consummated after a required number of subscribers had been obtained, and then only with a voluntary association of all subscribers then to be formed, a written warranty given at that meeting supersedes any oral promise of warranty made to individual subscribers.
6. In an action on a note for the price of a stallion, one of the plaintiffs testified that they owned the note, stated the amount due thereon, and that a bill of sale with warranties was given with the animal. Upon cross-examination he denied that he had offered P. a share in the horse for nothing if he would allow the use of his name to influence others. After plaintiff had so answered, a general objection was made and overruled. P. having been put on the stand by defendants was asked what offer had been made him, which question was objected to as incompetent, irrelevant, and immaterial, whereupon counsel stated it was offered to impeach plaintiff, and on this ground the objection was overruled. There was no issue of fraud in the case. *Held:*

   (1) The question was irrelevant on plaintiff's cross-examination, since plaintiff had given no testimony which the alleged statement tended to contradict.

   (2) The objection not being interposed until after the question was answered, and there being no motion to strike out the answer, plaintiffs, on appeal, could not take advantage of the fact that the question was answered.

   (3) On P.'s direct examination the objection should have been sustained. The question asked of plaintiff did not relate to a relevant fact, and hence his answer could not be contradicted even for the purpose of impeachment.
7. In an action for the price of a stallion, where no warranty is claimed as to the quality of the colts gotten by the horse, testimony that the colts gotten by him were defective is immaterial.
8. Although proper motions have been made to strike out and change the answers to a special verdict, where there are legal principles involved which were not appreciated by the parties or the trial court, and it is not improbable that on another trial there may be testimony on lines not covered on the first trial, a new trial is directed.

APPEAL from a judgment of the circuit court for Crawford county: GEORGE CLEMENTSON, Circuit Judge. *Reversed.*

Action to recover on a joint and several promissory note signed by the defendants, twelve in number. The complaint was in the usual form. The defendants answered to this effect: The note was given to the plaintiffs in part payment for a stallion, represented to be a full-blooded registered animal and very valuable for breeding purposes. The plaintiffs warranted the stallion to be a good foal getter and to successfully breed more than sixty per cent. of the animals served. They represented that it was worth no less than $2,800, and proposed that defendants should purchase it, each taking a share at $200, either in cash or joint note. Relying upon the representations and warranties aforesaid the defendants and others purchased the stallion, some paying cash and others signing the note sued on. The representations aforesaid were false and the warranties breached, in that the stallion was not a full-blooded registered animal and was incapable of getting more than forty per cent. of the mares served with foal, and was not worth anything for the purpose for which it was purchased. The answer also contained other allegations to the effect that the note was obtained by fraud, closing with a prayer for judgment dismissing the action with costs and for general relief. The evidence showed without controversy that the defendants, after becoming fully informed as to the character of the horse, retained him; that they never rescinded the transaction. The court accordingly ruled that the only defense available to the defendants was a claim for damages for breach of warranty. In respect to the warranty the controversy upon the evidence, as the trial court viewed the matter, was whether the plaintiffs through their agent or by themselves warranted the horse as alleged, whether the warranty was made to all the signers of the note, whether it was oral or in writing, whether it was breached, and if so to what extent the defendants were damaged. It was claimed on the

part of the plaintiffs that the only warranty made was contained in a bill of sale delivered to the defendants when the sale of the horse was finally consummated. The cause was submitted to the jury for special verdict with this result: (1) The plaintiffs by themselves or their agent, Mr. Dyer, warranted the horse to the defendants as a foal getter; (2) the warranty was made to all the persons who signed the note; (3) the warranty was oral; (4) the warranty was that the horse would beget from the mares bred to him sixty per cent. of foals; (5) he begot in fact but forty-four per cent.; (6) the agreement for the sale of the horse, including the warranty, was completed before the bill of sale containing the written warranties was delivered to the secretary of the association composed of the purchasers; (7) had the horse been as represented he would have been worth $1,500; (8) he was worth in fact but $200. Exceptions were taken on the trial on behalf of the plaintiffs to rulings on evidence and to rulings on various motions, preserving for review the questions discussed in the opinion. Judgment was rendered upon the verdict in favor of the defendants, and the plaintiffs appealed.

For the appellants there was a brief by *Graves & Earll* and *Chas. H. Schweizer,* and oral argument by *Mr. J. S. Earll* and *Mr. Schweizer.*

L. H. Bancroft, for the respondents.

WINSLOW, J. The transaction under investigation in this case is of a kind now frequently occurring, as the records of the courts will show. A stallion of alleged high breeding and great value is proposed to be sold in shares to a number of neighboring farmers for the philanthropic purpose of raising the standard of draft-horse stock in the vicinity and incidentally of making money for the owners. An agent spends weeks or months going from house to house interviewing possible purchasers, painting in glowing terms the benefits

which must result from the venture, generally seeking to obtain subscriptions to so-called shares of stock in the enterprise, or signatures to notes for such shares, or both, upon condition that a certain required number of shares are subscribed for. The agent has many talks, now with one man in the field, and again with two or three together at the village store or saloon. At these talks there is always more or less puffing of the horse, and word-painting of the probable profits of the venture varying according to the intellectual and artistic abilities of the agent. Finally the requisite number of subscriptions or signatures is obtained and a meeting of the subscribers held where the deal is consummated, the money and notes turned over and the printed pedigree delivered, and a more or less formal association of the subscribers perfected. When, in the course of a year or more, the notes are presented for payment it is frequently found that the roseate pictures painted by the agent have not been fully realized, the expected profits have not appeared, the virtues of the horse as a breeder have not come up to the confident predictions of the agent, the recollections of the subscribers as to the inducements held out to them by the agent differ widely from the recollections of the agent, and the matter comes before the courts for settlement upon an issue of fraud or broken warranty.

In a general way the present transaction seems to have followed the course indicated. The plaintiffs are importers and breeders of horses at Wayne, Illinois. They proposed to sell an imported Percheron stallion named Preval to an association to be formed composed of farmers and other citizens residing at or in the neighborhood of Soldiers' Grove in this state at the price of $2,600. One Dyer made the canvass, beginning his labors in the month of December, 1902, and claiming to have sold the necessary amount of shares April 30, 1903. He seems to have secured individual notes from some subscribers, as well as the joint note in suit signed by the defendants.

Some of those who went into the enterprise declined to give notes, but preferred to pay cash. A meeting was held May 7th at Soldiers' Grove at which most of the subscribers were present. Dyer testifies that all the notes were signed during the last days of April or first days of May and before the meeting. At the meeting Dyer was present, some cash was paid, Dyer either already had or there received the notes, an organization of the subscribers was effected, a president and secretary elected, Dyer gave the secretary some printed by-laws and blank stock certificates, also the pedigree of the horse; and *Erie,* who had been elected secretary, asked him where the guaranty was which he promised to show that the horse would get sixty per cent. of the mares served with foal. Dyer then produced a paper looking like a mortgage, which *Erie* says he did not read, and marked "sixty" on it and handed it to *Erie,* who immediately put it away in a drawer in a desk. *Erie* further says that this paper was soon afterwards destroyed by mice and he never read it. None of the subscribers ever read it. A paper was produced by the plaintiffs on the trial which was proven to be a copy of the paper so delivered and was introduced in evidence. It consists of a formal bill of sale of the horse from the plaintiffs to the Soldiers' Grove Percheron Horse Company, and contains a special warranty to the effect that, if the horse does not get fifty per cent. of the mares served with foal during the first full season, the plaintiffs will furnish to the company another stallion of *equal quality* in exchange upon return of the stallion in question at a certain time and place accompanied with certain proofs showing the failure. The horse was turned over to the association immediately after this meeting and was operated by their agents during the seasons of 1903 and 1904. There is neither pleading nor proof to the effect that it was ever returned, or offered to be returned, to the plaintiffs.

The answer contained allegations of breach of warranty

and of fraud in the sale. As there was no attempt to prove any return, or offer to return the horse, the court ruled that the question of fraud was not in the case. This was manifestly correct, because there could be no rescission on the ground of fraud without a return of the horse or an offer to return him. Thus, the only defense was the defense of breach of warranty. As the written warranty was a special warranty, only binding the plaintiffs to furnish another stallion upon condition of the return of the horse at a certain time and place, that also dropped out of the case, and the defendants were obliged to prove a separate oral warranty and its breach in order to make good their defense. There was an attempt made to prove the making of an oral warranty by the agent, Dyer, to the defendants prior to the meeting of May 7th, and the jury found, in answer to the first four questions of the special verdict, that an oral warranty that the horse would get sixty per cent. of the mares bred to him with foal was made to all the defendants. These findings were challenged as unsupported by the evidence, and this raises the first serious question in the case.

The defense of broken warranty is an affirmative defense, and, in order to justify these findings, there must be proof that the oral warranty was made to each one of the defendants. Proof that it was made to one individually raises no inference that it was made to others. Careful examination of the evidence shows that there was no proof showing the making of an oral warranty to more than four of the defendants, to wit, the defendants *Cutler Salmon, J. M. Dull, G. W. Townsend,* and *A. D. Smith.* These last-named defendants testified directly that Dyer orally guaranteed that the horse would get sixty per cent. of foal, but none of them testified that this oral warranty was made to any one except himself. Two defendants, viz., *Oscar Jeide* and *C. P. Fortney,* gave no testimony in the case, nor was there any testimony that any oral warranty was made to either of them. The defendant

N. N. Peterson was a witness, but did not testify on the subject, nor was there any testimony that any warranty was made to him. The defendant *John Tilley* testified that he heard nothing about the capacity of the horse as a foal getter, and the defendant *Henry Munyon* testified that he heard nothing particular about the horse. The defendants *James J. Erie* and *H. T. Fortney* testified affirmatively that they understood from Mr. Dyer that there was to be a written guaranty, although upon redirect examination they wavered somewhat. Thus it appears that there is no testimony that any oral warranty was made except as to four of the defendants, and hence that the verdict finding that it was made to the whole twelve is unsupported by any evidence. But, even if there were evidence tending to show that the agent made an oral warranty to each and all of the defendants, a well-established legal principle not noticed by the trial court or referred to in the briefs would still stand in the way of the defense. The sale was made by an agent, and it is settled in this court that in such case the vendee, in order to enforce an alleged express warranty claimed to have been made by the agent, must prove either that the agent had express authority from his principal to make it or that such sales are usually attended with such a warranty. *Westurn v. Page,* 94 Wis. 251, 68 N. W. 1003; *Waupaca E. L. & R. Co. v. Milwaukee E. R. & L. Co.* 112 Wis. 469, 88 N. W. 308; *Matteson v. Rice,* 116 Wis. 328, 92 N. W. 1109. Here there was no proof that such warranties are customary in such transactions, or that the agent had express authority to make the warranty claimed. On the contrary, there was affirmative uncontradicted evidence that the agent, Dyer, had no authority to make any warranty except the written one. Another principle which received no attention in the trial court is also to be considered in connection with the alleged oral warranty. If, as considerable testimony tends to show, the defendants understood that the talks had with them by the agent, Dyer, were merely tentative, and

that the transaction was only to be consummated after the required number of subscribers had been obtained, and then only with a voluntary association of all subscribers then to be formed, it is manifest that the written contract of warranty given at that meeting would supersede and take the place of any oral promises of warranty made to individual subscribers. This proposition was not placed before the jury either by question or instruction, but it is evidently a vital one upon the question of the alleged oral warranty.

Two alleged errors in the admission of testimony remain to be considered. The plaintiff *Charles R. Coleman* was placed on the stand by the plaintiffs, and testified that the plaintiffs owned the note, stated the amount due thereon, and that a bill of sale with warranties was given with the animal. Upon cross-examination he was asked whether he did not, at a certain place, offer Atley Peterson a share in the horse for nothing if he would allow the use of his name to influence others. The witness replied that he never did, and, after his reply was made, a general objection was made and overruled and exception taken. On the part of the defense Atley Peterson was put on the stand, and was asked what offer *Coleman* and Dyer made to him with reference to a share in the horse at the place named. The question was objected to as incompetent, irrelevant, and immaterial, and defendants' counsel stated that it was offered to impeach *Mr. Coleman,* and on this ground the objection was overruled, and Mr. Peterson stated that they offered him a share in the horse free if he would sign the subscription and give them the use of his name. The question asked of *Mr. Coleman* could only be relevant as tending to show fraud in the sale or as tending to contradict some previous statement which he made. But, as we have seen, there was no issue of fraud in the case, and *Mr. Coleman* had given no testimony which the alleged statement tended to contradict, and hence the question was irrelevant. However, as no objection was made to the question

until after it was answered, and there was no motion to strike out the answer, the plaintiffs are not in position now to take advantage of the fact that the question was answered. But objection was properly made to the contradicting testimony of Mr. Peterson, and this objection should have been sustained. The question asked of *Mr. Coleman* did not relate to a relevant fact, and hence his answer could not be contradicted even for the purposes of impeachment. *Waterman v. C. & A. R. Co.* 82 Wis. 613, 52 N. W. 247, 1136. Certain witnesses were allowed against objection to testify that some of the colts gotten by the horse had defects, such as puffed hind legs, or crooked legs, or were not average colts. It is not claimed that any warranty was given as to quality of the colts, and we have been unable to see the materiality of this testimony. The plaintiffs moved to strike out the answers to questions 3, 4, and 6 of the special verdict and insert answers favorable to the plaintiffs, and for judgment on the verdict as so corrected, and we have entertained some doubt whether we should not, upon reversal, direct the entry of judgment for the plaintiffs, as in *Muench v. Heinemann,* 119 Wis. 441, 96 N. W. 800, and *Hay v. Baraboo,* 127 Wis. 1, 105 N. W. 654. This should only be done, however, where it conclusively appears that in no event could a new trial otherwise result. *Hay v. Baraboo, supra.* In the present case we are not satisfied that it so appears. As indicated in this opinion, there are legal principles involved which were not appreciated by the parties or the trial court, and it is not improbable that upon a new trial there may be further testimony on lines not covered in the first trial. We shall therefore direct a new trial.

By the Court.—Judgment reversed, and action remanded for a new trial.

CAPE and others, Trustees, Appellants, vs. PLYMOUTH CONGREGATIONAL CHURCH and others, Respondents.

November 12—December 4, 1906.

Appeal and error: Trial after reversal: Law of the case: Religious societies: Rights of members: Diversion of property: Trusts: Exercise of power of appointment by trustee: Evidence: Withdrawal of one unit from religious denomination: Resolutions of supreme body: Bill of exceptions: Certification as to evidence: "All the evidence:" Judgments.

1. When on appeal from an order sustaining a demurrer a decision has been made by the supreme court it becomes the law of the case, and must control any situation not materially variant from that set forth by the complaint and then considered.
2. Neither seceding members, though a majority, nor any majority of a religious society, no matter how fully invested with all corporate powers, have a right to divert its property from the uses defined and limited by the grant of such property to it or the purposes of its organization as regards the particular religious faith it was organized to promote.
3. A religious society holding property charged with a trust for certain purposes cannot, even by due corporate action, divert it to other and inconsistent uses; and when such use is for the promotion of the doctrine and discipline of some particular denomination, courts will prevent diversion to the support of a different and inconsistent one, if even a single individual legally interested objects.
4. Where a deed of lands gave to trustees the right to appoint, not an individual corporation or society, but some religious denomination, to exercise ecclesiastical control over the premises, viz., the occupation for religious services on Sundays and Wednesday evenings, an appointment of a designated religious denomination necessarily implies a limitation of such use to the doctrines and purposes of that denomination.
5. Under a deed to trustees authorizing the appointment of some religious society to exercise ecclesiastical possession over church premises, the trustees made appointment to the Primitive Methodist Society, which was a subordinate member of, and subject to the discipline and regulations of, a conference, a synodical religious organization. These regulations provided, among other things, that all property was held subject to the uses of each society when not inconsistent with the discipline and usages of the Primitive Methodist Church, and should any society having

property cease to exist, or exist contrary to the usages and discipline of the Primitive Methodist Church, then its property should pass to the conference trustees to be held for the benefit of any organized Primitive Methodist society in the place where the real estate was situated, or, if impracticable, then to be held for the general purposes of the church and under the direction of the annual conference. *Held*, that the use of the property in question was restricted to a society subject to the discipline and supporting the doctrine of the Primitive Methodist denomination.

6. In such case, where the Primitive Methodist Society repudiated submission to the synodical head of the Primitive Methodist Church, and set itself up as the supreme authority over its own affairs and over its members in matters religious and secular, such action is *held* to be a departure from the use and purpose for which the possession of the property in question was originally conferred on the society and the use to which the property was limited.
7. To constitute one a member of a church, or an individual society a member of a general synodical organization, at least two things are essential: a profession of the accepted faith and a submission to its government.
8. Under a deed to trustees authorizing them to appoint some religious denomination to exercise ecclesiastical possession over the premises in question, the trustees appointed the Wesleyan Methodists to such use. In 1850 the Wesleyan Methodists withdrew from the occupation and ceased holding religious services upon the premises, and there was proof of some arrangement between them and the Primitive Methodist Society to occupy it, and that most of the original trustees were participants in the negotiations. It further appeared that immediately the Primitive Methodists entered into possession with apparent assent and approval of the trustees, and thence onward held religious services with the knowledge and active co-operation of several of the trustees. *Held*, in view of the remoteness of the transactions and the absence of any prescribed form by which the trustees were to make appointment, that the showing of long occupation, reputation, and apparent approval were sufficient, and, in the absence of anything in conflict, established a legal and proper appointment to the Primitive Methodist Society.
9. A resolution of the general conference of the Primitive Methodist Church: "If any church or circuit shall have decided to withdraw from the connection, we bid them God speed, and pray that their newer association may bring to them grander opportunities for the advancement of His Kingdom," is *held* not to have become a part of the discipline of the church, or open to

construction as a consent, approval, or authorization of any withdrawal whatever, but to have merely the significance of an expression of resignation to a situation of inability to prevent such withdrawals, and lack of animosity towards those exercising such right.

10. Under a deed to trustees with power to appoint some religious denomination to exercise the ecclesiastical possession over the granted premises and with power to make another appointment should the appointee "withdraw its services," a second appointment vests in the appointee the right to the possession and use of the premises until it in turn withdraws its services.
11. Where a religious society was entitled to the use of certain church property until it withdrew its services, and, having been supplanted by another society, was strenuous in its efforts to regain possession for the purpose of conducting its services, failure to maintain religious services in the church is *held* not to be a withdrawal of such services.
12. A bill of exceptions recited, at the close of the evidence, that it contained "all the evidence material to the questions raised on the appeal," and in the certificate it was declared to contain "all the testimony given on both sides necessary to present the questions raised upon the appeal." *Held*, that the recitation at the close of the evidence, and necessarily certified to be true by the judge's signature, satisfied all requirements.
13. In the rule that, to enable this court on appeal to go behind either the findings or the verdict, there must be a certificate of the trial judge that the bill of exceptions contains all the evidence, the expression "all the evidence" means all *necessary* evidence.
14. Where a religious society, only entitled to a limited use and possession of a church edifice, recovers judgment establishing its right to possession, the judgment should only establish its right to such limited possession and use.

APPEAL from a judgment of the circuit court for Iowa county: E. RAY STEVENS, Judge. *Reversed.*

This is the same action in which the complaint was sustained upon demurrer in 117 Wis. 150, 93 N. W. 449. It has since been tried and findings filed presenting, as is claimed, widely variant facts from those stated in the complaint. The original deed, in trust, under which both parties claim, is the same set forth in the former case. The findings declare, however, that, instead of a secession of a majority of

the members of the old Dodgeville Methodist Society, there occurred an incorporation of that society into the Dodgeville Primitive Methodist Church, and then a vote by an overwhelming majority of the members of such corporation that the corporation itself sever its relations with the Primitive Methodist Church or Western Conference, of which the old society had been a member, and ally itself with the denomination of the Congregational Church, and thereafter merely a change of name of the corporation to the *Plymouth Congregational Church,* and that the defendant corporation is the same society as that which, prior to 1897, occupied the church property and of which the plaintiffs were members and officers. There is also a finding to the effect that the church building on the premises in question was burned in 1879, and rebuilt in 1880 by general subscription of citizens of Dodgeville and surrounding country, which were made, not with any understanding that the premises should be forever used as a place of worship by the said Dodgeville Primitive Methodist Society, but with the understanding that such edifice would be erected, controlled, and used agreeably to the terms contained in the original trust deed; also, "that a Congregational church is a separate, independent, self-governing religious body, owing no obedience or allegiance to any other church, synod, conference, council, or supervisory judicatory whatever; that each such Congregational church selects its own pastor, adopts its own creed and decides upon and establishes its own forms of worship;" and that since the incorporation of the defendant there has been no change of the creed, doctrines, or forms of worship used by such church when it called itself the Dodgeville Primitive Methodist Society. It appeared, substantially without dispute, that immediately after such incorporation, and upon affiliation with Congregational churches, which was done by formal public act, a considerable number of the members of the old Primitive Methodist Society withdrew from affiliation therewith,

and organized and attempted to maintain a society of the Primitive Methodist denomination in affiliation with and subordination to the general synod or conference of that faith, and have so continued up to the present time, and with considerable persistency have been endeavoring to regain control and possession of the premises now in controversy, meanwhile holding meetings at stated intervals, first at the residence of the several members, but later in the city hall. The court finds that the plaintiffs and those associated with them are at present unable to furnish public religious services in the church edifice, even if they are given possession of it. So far as other findings materially vary the situation, the substance of them will appear in the opinion. The trial court decided that there had been no diversion of the property from its legitimate uses, and rendered judgment dismissing the complaint, from which plaintiffs appeal.

For the appellants there was a brief by *Spensley & McIlhon, T. M. Priestly,* and *Carter & Mason,* and oral argument by *Vroman Mason* and *Calvert Spensley.* They contended, *inter alia,* that the right to occupy the church building, having come to the Primitive Methodist Society while connected with that denomination as a subordinate branch, and property having been acquired by that church while so connected, the defendants lost all right to that possession and use by severing connection with the denomination. *Cape v. Plymouth Cong. Church,* 117 Wis. 150; *Franke v. Mann,* 106 Wis. 118; *McBride v. Porter,* 17 Iowa, 203; *Mt. Helen Baptist Church v. Jones,* 79 Miss. 488; *Bonacum v. Harrington,* 65 Neb. 831, 91 N. W. 886; *Den ex dem. Am. P. Soc. v. Pilling,* 24 N. J. Law, 653; *M. E. Church v. Wood,* 5 Ohio, 283; *McAuley's Appeal,* 77 Pa. St. 397; *Roshi's Appeal,* 69 Pa. St. 642, 8 Am. Rep. 275; *Schnorr's Appeal,* 67 Pa. St. 138, 5 Am. Rep. 415; *Jones v. Wadsworth,* 11 Phila. 227, 33 Leg. Int. 390; *Harmon v. Dreher,* Spears Eq. (S. C.) 87; *Rodgers v. Burnett,* 108 Tenn. 173; *Kinkead v. McKee,* 9

Bush (Ky.) 535; *Sutter v. First Reformed Dutch Church,* 42 Pa. St. 503; *McGinnis v. Watson,* 41 Pa. St. 9; *Baptist Church v. Fort,* 93 Tex. 215; *Winebrenner v. Colder,* 43 Pa. St. 244; *Associate Ref. Church v. Trustees Theological Sem.* 4 N. J. Eq. 77; *Ferraria v. Vasconcelles,* 23 Ill. 456; *Lewis v. Watson,* 4 Bush, 228; *Bouldin v. Alexander,* 15 Wall. 131; *Schlichter v. Keiter,* 156 Pa. St. 119; *Den ex dem. Day v. Bolton,* 12 N. J. Law, 206.

For the respondents there were briefs by *Aldro Jenks* and *J. P. Smelker,* and oral argument by *Mr. Jenks.*

DODGE, J. Of course the former decision has become the law of this case, and must control any situation not materially variant from that set forth by the complaint and then considered. *Euting v. C. & N. W. R. Co.* 120 Wis. 651, 98 N. W. 944. The variation most strenuously urged is that, instead of secession by certain members from the society, the society itself made whatever change occurred by incorporating, changing its name, withdrawing from affiliation with and subordination to the Western Conference of the Primitive Methodist Church, and allying itself with the Congregational denomination, all by majority vote of its members in meeting duly assembled. Let this fact be conceded for the purposes of the argument, what is the result? The same authorities cited in the former opinion to deny the right of seceding members, though a majority, to take with them the property of the society also deny the power of the officers, or any majority of a religious corporation, no matter how fully invested with all corporate powers, to divert its property from the uses defined and limited "by the grant of such property to it or the purposes of its organization as regards the particular religious faith it was organized to promote." *Franke v. Mann,* 106 Wis. 118, 130, 81 N. W. 1014, 1018. A religious corporation holding property charged with a trust for certain purposes can no more divert it to other and inconsistent

uses, even by due corporate action, than can any other trustee. When such use is for the promotion of the doctrines and discipline of some particular denomination, courts will prevent diversion to the support of a different and inconsistent one, if even a single individual legally interested objects. *Fadness v. Braunborg,* 73 Wis. 257, 293, 41 N. W. 84; *Franke v. Mann, supra; Den ex dem. Day v. Bolton,* 12 N. J. Law, 206; *Watson v. Jones,* 13 Wall. 679; *First C. P. Church v. Congregational Soc.* 23 Iowa, 567. Under the rule above stated, doubtless the property which courts are to protect against diversion must be subject to some limitation upon its use. Whether limitation results from the mere denominational character of the religious corporation or society holding it is perhaps doubtful, but unnecessary of decision here, for other facts conclusively appear. If it be assumed that the Primitive Methodist Society held rights in this real estate as the appointee under the deed from Jabez Wilson, then they held them for denominational purposes, for the authority given by that deed to the trustees named therein was to appoint, not an individual corporation or society, but some religious denomination, to exercise what may be called the ecclesiastical possession over the premises, namely, the occupation for religious services on Sundays and on Wednesday evenings. Hence any appointment of the Primitive Methodists would necessarily imply a limitation of such use to the doctrines and purposes of that denomination. Further than this, however, the rights of the old Primitive Methodist Society were, up to the time of the incorporation, held by it as a subordinate member of the Western Primitive Methodist Conference, a synodical religious organization, and subject to its discipline and regulations. Among such we find sec. 233, to the effect that all property is held subject to the uses of each society "when not inconsistent with the discipline and usages of the Primitive Methodist Church;" and sec. 271, providing that should any so-

ciety having property cease to exist, or exist contrary to the usages and discipline of the Primitive Methodist Church, then its property should pass to the conference trustees to be held for the benefit of any organized Primitive Methodist society in the place where the real estate is situated; or, if this be impracticable, then to be held for the general purposes of the church and under the direction of the annual conference. These clearly restrict the use of the property in question to a society subject to the discipline and supporting the doctrine of the Primitive Methodist denomination.

The next question seriously controverted is whether any diversion from such restricted use has occurred. This is answered in the negative by respondents and, apparently, by the trial court, on the strength of the finding that no change in doctrine or forms of worship has been had. This, however, does not cover the whole question. To constitute one a member of a church, or an individual society a member of a general synodical organization, at least two things are essential: a profession of the accepted faith and a submission to its government. *Den ex dem. Day v. Bolton,* 12 N. J. Law, 206. The Primitive Methodist Church clearly belonged in the third classification of ecclesiastical bodies promulgated by MILLER, J., in *Watson v. Jones,* 13 Wall. 679, and adopted in *Franke v. Mann,* 106 Wis. 118, at page 133 (81 N. W. 1019), namely:

"Where the religious corporation or ecclesiastical body holding the property is but a subordinate member of some general church organization in which there are superior ecclesiastical tribunals with a general and ultimate power of control, more or less complete, in some supreme judicatory, over the whole membership of that general organization."

The Primitive Methodist churches, in several of the Western states, were consolidated into what was called a general conference, known as the Western Conference, under the discipline of which there was primarily the society or congrega-

tion as a unit, having power to own property, and, by certain prescribed officers, to manage the ordinary daily affairs. Next in ascendency a few neighboring societies were organized into a circuit or charge, often, though perhaps not always, served by a single pastor or minister. The Dodgeville society, with three others, constituted a circuit. The discipline prescribed what was called the Quarterly Conference, which was made up of certain designated representatives from the several societies in the circuit, to wit, all the preachers, exhorters, class leaders, assistant leaders, stewards, Sabbath school superintendents, assistants and secretaries, Sabbath school treasurer, president of trustee board, and the presidents of all organizations connected with and under the control of the church. This conference had certain designated powers and authority over the various societies comprising its circuit. Then there was the supreme body known as the Annual Conference, composed of certain general officers, all ministers in full connection, and one lay delegate for each 100 members from each circuit or station within its limits. This conference was given the broadest powers of supervision, control, and judicatory in the government of all the societies and circuits composing it. The distinguishing feature of the churches of the Congregational denomination, on the other hand, is that each is a complete and independent republic and adopts its own laws, its own construction of the scriptural doctrine, its own church polity; and in none of these respects is it subject to any control by any other or more comprehensive organization. As is at once apparent, it might be a question of much nicety for a court to decide whether a Congregational society had so departed from the purposes of its organization as to constitute a breach of a trust to use its property for the purposes of Congregationalism, although cases are not lacking where courts have done so. *Mt. Zion B. Church v. Whitmore,* 83 Iowa, 138, 39 N. W. 81. But in the case of a society which is a member of a larger synodical

body the question is much easier of solution. It is beyond dispute that when the corporation known as the Dodgeville Primitive Methodist Church severed its membership in the Western Primitive Methodist Conference, declared itself a Congregational church, and made formal application for association with and recognition by other Congregational churches, it terminated its submission to the government of that general body known as the Primitive Methodist Church. It was no longer bound by or subject to the doctrines which should be promulgated, or the rules for protecting individual rights either of belief or against perversion of church property from uses which the conference might demand. A mere vote of the congregation might carry it far afield from the creed to which Primitive Methodists must subscribe and which it must promulgate if a member of the conference. Its members had no longer the assurance that the faith taught should have the sanction of the general body of Primitive Methodists in the West. Although it be true, as found by the court, that the corporation did persist in the doctrines which in 1897 received general approval by the conference, that fact of itself may mark a doctrinal severance from the Primitive Methodist Church, for the Annual Conference may have become convinced of some error in formerly entertained views, or may have had new occasion for construction and interpretation of the scriptural utterances upon which the faith of Christian churches generally is founded. But, as already suggested, whatever may be true of doctrine, the church polity and government was radically changed. No longer were the rights of the members guarded by the wisdom of the Annual Conference in the selection of their pastor, in the management of the property of the church, or in the multitudinous other respects in which the individual member may suffer at the hands of the majority. We cannot avoid the conclusion that the repudiation, even by the society or corporation, of submission to the Annual Conference and setting itself up

as the supreme authority over its own affairs and over its members in matters religious and secular, was a departure from the use and purpose for which the partial possession in this property was originally conferred on the society and to which use such property was limited, and, therefore, that it exceeded the right or power over that property had by either the corporation or its governing officers.

In the view adopted by the trial court that the defendant corporation is the same society existing prior to 1897 under the name of the Dodgeville Primitive Methodist Church, and which, for some fifty years, had been in possession of these premises, of course the defendants could have no greater right than had the former society, and the sole question for decision is whether their procedure was such as to continue those rights of possession or partial possession. This renders it rather unimportant whether there ever was complete nomination and appointment of the Primitive Methodist denomination in lieu of the Wesleyan Methodists in compliance with the trust deed from Wilson, for the old society at least had and exercised possession, and defendants were as much restrained and limited in an attempt to pervert that possession as if the title were absolute. We have, however, examined the evidence upon the question of appointment, and are persuaded that it suffices to establish the fact of actual appointment by the original trustees. It is proved that about 1849 or 1850 the Wesleyan Methodists did withdraw from the occupation of and holding religious services upon these premises, and that some arrangement was made between them and the Primitive Methodist Society to occupy it, whereby the latter refunded some money which the Wesleyans had paid toward the cost of the original church edifice; also that most, if not all, of the trustees under the Wilson deed were participant in such negotiations; that immediately the Primitive Methodists entered into possession with the apparent assent and approval of such trustees, and from 1850 onward held

their religious services on Sundays and Wednesday evenings there, with the knowledge and active co-operation of several of such trustees. In view of the remoteness of these transactions and of the absence of any prescribed form by which the trustees under the deed were to make appointment of the denomination to supply such religious services, we are persuaded that this showing of long occupation, reputation, and apparent approval are sufficient, in the absence of anything in conflict, to establish a legal and proper appointment. 1 Jones, Ev. § 72 *et seq.;* 22 Am. & Eng. Ency. of Law (2d ed.) 1289; 2 Wigmore, Ev. § 1583; *Rooker v. Perkins,* 14 Wis. 79; *Nelson v. Jacobs,* 99 Wis. 547, 559, 75 N. W. 406.

Much stress was laid in argument upon a resolution adopted by the general conference of the Primitive Methodist Church in May, 1896, to the effect that "if any church or circuit shall have decided to withdraw from the connection, we bid them God speed, and pray that their newer association may bring to them grander opportunities for the advancement of His Kingdom." This was contended by the respondents to become, so to say, a part of the discipline, and to make it the right of any congregation to withdraw. We deem this resolution immaterial to the present controversy. In the first place, if an authorization, as claimed, it was addressed only to the circuit or charge, which could act only in quarterly conference, as hereinbefore described, and had no application to secession by an individual society without action of the conference. Apart from this, however, we can find nothing in the resolution significant of an intent to waive the provisions in the discipline above referred to, providing for the retention of the property of any society which should secede, for the benefit of any Primitive Methodist Society at that place. But we do not think that the resolution is open to construction as a consent, approval, or authorization of any withdrawal whatever. It bears upon its face, especially in the light of the surrounding facts, merely the significance of

an expression of resignation to a situation of inability to prevent such withdrawals and lack of animosity toward those who should exercise such right. There is a claim, not, however, strongly urged on the part of the defendants, to the effect that, having obtained in March, 1897, from the survivors of the original trustees named in the Wilson deed a quitclaim deed of the premises in question, they have the rights of an appointee under that trust. The deed itself is in the simplest form of a quitclaim deed, and contains no intimation of any purpose to exercise the power of appointment vested in the trustees. But whether, under any circumstances, it may be so construed, we find it unnecessary to decide, for we deem it plain that, under the terms of the trust, there was no power vested in the trustees to revoke an appointment once made. The original dominant occupant was to be the Wesleyan Methodists denomination, and the power of appointment did not arise until that denomination "shall withdraw its services." The authority then was to appoint another denomination to enjoy and serve the same purposes. We think it plain that, such an appointment being made, such denomination became vested with the right until it in turn should withdraw its services. We cannot at all agree with the suggestion of respondents' counsel that the failure of the Primitive Methodist Society existing at Dodgeville since 1897 to maintain religious services in this church since that time is at all tantamount to a withdrawal. They have been most strenuous, energetic, and persistent at all times in demanding an opportunity so to do, and, while the society may have been small and struggling during that period, it requires but common knowledge to understand that its very inability to gain possession of this place of worship has been a cogent influence toward that situation. We cannot find evidence to support the somewhat prophetic finding that plaintiffs and their associates are unable to furnish public religious services if they were given possession of the church premises. They

are recognized by the Annual Conference as an established society; they do maintain regular services, even deprived of a desirable meeting place; their number now is somewhere from fourteen to fifty, with no suggestion of inability to supply pecuniary needs. Besides, were they in occupation of these premises, their number would, beyond doubt, be augmented by many of the defendants' present congregation, who, not ardent in support of either faction, follow the *de facto* authorities.

It is urged that we cannot review the findings for the reason that it is not sufficiently certified that the bill of exceptions contains all the evidence. That document contains a recitation to the effect that therein is "all the evidence material to the questions raised on the appeal," and in the certificate it is declared to contain "all the testimony given on both sides necessary to present the questions raised upon the appeal." Doubtless there are many expressions in our decisions declaring the necessity generally that there shall be a certificate by the trial judge that the bill of exceptions contains all the evidence, to enable this court on appeal to go behind either findings or verdict. The expression "all the evidence" is, however, used in those cases in the sense of all necessary evidence. It would, of course, be absurd to require that all the evidence received upon a protracted trial with many issues must be before this court to enable it to examine the correctness of a finding by a court or jury upon a single one of those issues. In this view the rule of court on the subject (Circuit Court Rule XXII, sec. 3) provides that the bill of exceptions shall contain only so much of the evidence as may be necessary to present the questions of law raised on the trial, and requires of the trial judge that he strike out redundancy. Further than this, it has been declared by this court sufficient that the bill contain all the evidence material to the questions raised upon the appeal. *Reinke v. Wright,* 93 Wis. 368, 370, 67 N. W. 737. In the

light of such reason and decision we cannot doubt that the recitation inserted at the close of the evidence, and necessarily certified to be true by the judge's signature, satisfies all requirements, although the certificate itself, merely to the effect that all the *testimony* is contained therein, might not suffice. *Goodhue v. Bohen,* 122 Wis. 241, 245, 99 N. W. 216.

Perhaps a precautionary word is necessary to emphasize the fact that the rights here considered, whether they belong to plaintiffs or defendants, are very limited in their character, and are only those prescribed by the Wilson deed for what we may term a dominant religious sect, namely, to use the church only at specified times, subject to the command that otherwise it shall be open to ministers of other denominations and for other purposes of moral tendency. In this view the plaintiffs, though entitled to judgment against the defendants, are entitled to be protected in only such rights as the trustees in the Wilson deed could confer. They should have judgment establishing the right of the plaintiff society to have the use of the church edifice from 10:30 to 12:30 o'clock Sunday mornings and at 6 o'clock Sunday evenings and on every Wednesday evening, and that defendants be enjoined from in any wise interfering with such use.

By the Court.—Judgment reversed, and cause remanded with directions to enter judgment in accordance with the prayer of the complaint, except as qualified in the foregoing opinion.

EVANS, Respondent, vs. CRAWFORD COUNTY FARMERS' MUTUAL FIRE INSURANCE COMPANY, Appellant.

November 12—December 4, 1906.

Vendor and purchaser: Transfer of title by operation of law, when takes effect: Same, as to third person: Same, as affecting insurance: Husband and wife: Implied agency of wife: Extent and authority: Ratification by husband: Insurance: Proofs of loss by wife: Fraud: False swearing.

1. In a transfer of realty by operation of law the transition occurs when the last act requisite thereto takes place regardless of the date of the agreement, if there be one, to which all acts in that regard are referable.
2. In case of a transfer of realty pursuant to a prior agreement the rights of the parties as to strangers, in the absence of any agreement to the contrary between such parties, are referable to the actual transition of the property.
3. In case of an agreement to transfer land on which there is a building, the owner being insured against loss thereof by fire and a destruction of such building after such agreement and subsequently a consummation of such agreement as to what remains, in the absence of any contract to the contrary, as regards the insurer, the right to recover for the loss is in the executory vendor.
4. The doctrine of relation operates to carry a transfer of realty back to the agreement to which it is referable so far as necessary to protect the equitable rights of the vendee, but strangers to the transaction cannot claim any benefit thereof.
5. If a husband absents himself from home, keeping his whereabouts unknown and leaving his property wholly under the care of his wife, she is his agent by implication of law (*ex necessitate*) to do those things which customarily are delegated to wives having such charge of property. Beyond that the wife cannot bind the husband as his general agent regardless of whether her act to that end be judicious or not from a business standpoint.
6. The authority of a wife as agent for her husband by implication of law does not, under any circumstances, extend to selling and conveying his real estate.
7. The rule that, if a wife contracts, assuming to act for her husband, so that the benefit comes to his hands and he does not disavow within a reasonable time, he is bound as having authorized the contract, does not apply to acts of the wife where

the benefit comes to her. In such circumstances, as to general contracts, ratification by some affirmative act with knowledge of the facts recognizing the wife as having had authority to make the agreement is necessary to bind the husband.

8. If a wife is left in charge of insured property and a loss occurs, and the husband from the circumstances of his situation cannot be reached so as to enable him to make the proofs of loss, the wife may do so by implied appointment.

9. An agent, *ex necessitate*, to make proofs of loss under an insurance policy has no apparent authority beyond that necessary to effect the object of the implied appointment. If in making the proofs she commits a fraud it does not become that of the husband unless he becomes a party to the deceit by ratifying her act with knowledge of the facts.

10. The terms of an insurance policy providing that false swearing of the assured in making the proofs of loss shall avoid the policy do not apply to an agent *ex necessitate* to make such proofs, unless the principal, with knowledge of the facts, ratifies the agent's act.

11. In case of the commission of a fraud by an agent as above suggested and the husband seeks to enforce the policy in good faith according to the proofs, he does not become a party to the deceit by the mere fact that he has knowledge of the claim of the insurer. So long as he proceeds reasonably, in good faith, to enforce his claim he is not a participant in the fraud of the agent by ratification.

[Syllabus by MARSHALL, J.]

APPEAL from a judgment of the circuit court for Crawford county: GEORGE CLEMENTSON, Circuit Judge. *Affirmed.*

Action to recover on an insurance policy. The complaint was in due form for the recovery of loss by fire insured against by the contract contained in the policy. The defendant answered, among other things, that plaintiff had no insurable interest in the dwelling house, which was insured for $600, and that he forfeited all right to recover by reason of false swearing in making proofs of loss. The policy contained conditions on both of such subjects. The evidence was to the effect that plaintiff purchased the farm upon which the dwelling house insured was located at the agreed price of $4,600, $600 being paid down, and the vendor, A. J. Hag-

gerty, giving plaintiff a land contract in the usual form. The plaintiff went into possession and made permanent improvements on the farm to the value of about $1,000. About a year and a half after the purchase was made, during which time plaintiff paid interest to the amount of $240, it was agreed between the parties to the contract and one Kane that the latter should take a deed of the premises from Haggerty and make a new land contract to the plaintiff similar to the one made by Haggerty, and that the former should be substituted for the latter. That agreement was carried out, the new contract bearing date October 3, 1901, or about six months prior to the actual transaction between Kane, plaintiff, and Haggerty. January 23, 1902, plaintiff took out the insurance policy through the agency of Mr. Kane, insuring the dwelling house for $600, the household furniture therein and household goods for $300, and provisions to the amount of $50. Several months thereafter plaintiff received an injury from which blood poisoning set in and he left home and remained away, his whereabouts being unknown, for about a year, when it was discovered that he was being cared for as an insane person in an asylum at Danvers, Massachusetts. Some time thereafter he recovered his normal condition and returned to his home. During his absence and on March 1, 1903, taxes upon the land and interest upon the land contract being in default and Mrs. Evans being somewhat embarrassed in respect to caring for the property, Mr. Kane proposed to give her $100 for a surrender of the property to him. She expressed a willingness to accept the proposition upon condition of her having till April 1, 1903, to dispose of her personal property, Mr. Kane to deposit the $100 with Thomas Coughlin and she to deposit with him the land contract and to vacate the premises in thirty days, the money and contract to be then delivered to the parties entitled thereto. The money and contract were deposited accordingly, but the contract was not deposited till after the fire occurred. Mrs.

Evans subsequently took the $100 and Mr. Kane took the contract. Proofs of loss under the policy were made by Mrs. Evans as agent for her husband, aided by Mr. Sime, president of the defendant company. Before plaintiff returned she commenced an action in his name to recover the loss. After such return the litigation was conducted by his direction. The cause was submitted to the jury for a special verdict containing questions agreed upon by counsel to cover the matters in controversy. The verdict rendered was as follows:

"(1) Did the plaintiff's wife, Mary Evans, knowingly and with intent to defraud the defendant company, make any false statements in the proofs of loss submitted to the defendant company, in regard to the amount, value, or condition of any of the property damaged or destroyed by the fire on March 5, 1903? *A.* No. (2) Did the plaintiff keep a good ladder of sufficient length to reach the roof of his dwelling house in the immediate vicinity of said house? *A.* Yes. (3) If you answer the second question 'yes,' answer this question: Was said ladder in the immediate vicinity of said house at the time of the fire? *A.* Yes. (4) Was the plaintiff's dwelling house provided with a scuttle or other means of reaching the under side of the roof from the inside of the house? *A.* Yes. (5) If the court should finally decide upon your findings and the law applicable to this case that the plaintiff is entitled to recover, at what sum do you assess the value of the personal property damaged or destroyed by said fire, to wit: (A) At what sum upon the household furniture? *A.* $51.26. (B) At what sum upon the wearing apparel? *A.* $50. (C) At what sum upon the bedding? *A.* $25. (D) At what sum upon the provisions? *A.* $25."

Defendant's counsel moved the court to change the answer to the first question from "No" to "Yes" and to strike out the answer to the fifth question, and for judgment in favor of the defendant on the verdict as so corrected. As an alternative defendant's counsel moved the court upon the exceptions taken on the trial to set aside the verdict and grant a new trial, and further to set aside the verdict and grant a

new trial upon various other exceptions specified. The motions were overruled. Thereafter judgment was rendered in favor of the plaintiff according to the special verdict and the defendant appealed.

For the appellant there was a brief by *Graves & Earll* and *Chas. H. Schweizer,* and oral argument by *Mr. Schweizer.*

For the respondent there was a brief by *Grotophorst, Evans & Thomas* and *Howe & Gilman,* and oral argument by *W. E. Howe* and *H. H. Thomas.*

MARSHALL, J. Respondent was the owner of the land on which the dwelling house mentioned in the policy was situated when the insurance was effected. He was in possession thereof under a land contract, was not in default, and had made some payments on such contract, and also had made valuable improvements on the land. The equitable ownership was in him, the legal title only being in his vendor in trust to secure the unpaid purchase money. That made him to all intents and purposes the owner of the premises, his interest being of sufficient dignity to satisfy the calls of a policy as to the interest of the insured being entire, unconditional, and sole ownership. *Johannes v. Standard F. Office,* 70 Wis. 196, 35 N. W. 298; *Wolf v. Theresa. V. Mut. F. Ins. Co.* 115 Wis. 402, 91 N. W. 1014. That situation was not efficiently changed prior to the destruction of the dwelling house by fire, unless the contract right to such property was theretofore extinguished by the acts of respondent's wife. Thus far there does not seem to be any controversy in the case.

It follows that when Mrs. Evans proposed to Mr. Kane, the then executory vendor, to surrender her husband's interest in the land for $100, upon condition of her being allowed till the first day of the succeeding April to dispose of the personal property thereon, and the deposit was made with a mutual agent, of the $100 by Mr. Kane, and of the land contract by Mrs. Evans, she to draw the money and Kane to

obtain the contract, upon surrender of the property being made, respondent was the owner of such property, and such ownership was not subject to extinguishment except by act or operation of law or by deed or conveyance in writing subscribed by him or by his lawful agent thereunto authorized in writing. Sec. 2302, Stats. 1898. An authorized surrender of the contract to Kane and delivery of possession of the premises to him and acceptance thereof with intention to extinguish the contract right would have satisfied the requisites of the statute as to transfer by operation of law.

It is contended by appellant's counsel that the agreement and deposit of the money before the fire, and the agreement and the withdrawal of the money by Mrs. Evans and abandonment of the land by her after the fire, satisfied all the requisites of a transfer of an interest in realty by operation of law as of the date of the agreement, so that when the property was destroyed plaintiff had no insurable interest therein and so could not legitimately recover on the policy.

Now, assuming, for the moment, that Mrs. Evans had authority to dispose of her husband's realty, as it is claimed she did, we are unable to see that there was a transfer thereof before the fire; and how a transfer thereafter could antedate the fire and supersede the cause of action on the policy which became fixed thereby, subject to conditions precedent as to enforcing the same, is not perceived. If the position of appellant be correct, then in any case where the owner of land on which there is a building insured against loss by fire gives a contract to another to sell the property to him, the sale to be consummated at a time stated but in the meantime such owner to remain in possession, and before the time arrives for such consummation the building is destroyed by fire, if the parties see fit to carry out their agreement, nevertheless, and do so, neither one of them can recover for the loss. The new one cannot because he was not the one insured, and the former cannot, though he owned the property at the time

of the fire, because his ownership was thereafter divested pursuant to an agreement made before the fire. We are not referred to any principle or authority to support that view. It is rather assumed the surrender of the premises to Mr. Kane, if there were such surrender in fact, and the withdrawal by Mrs. Evans after the fire of the $100 from the mutual agent, and deposit with him of the contract, by relation, operated to terminate plaintiff's interest in the land before the fire and as of the date of the agreement.

It is quite familiar that if one agrees, even verbally, to a sale of real estate and afterwards executes the agreement by conveying the land, for the purpose of protecting the equitable right of the executory vendee, the deed will be regarded as having taken effect as of the date of the agreement. 24 Am. & Eng. Ency. of Law (2d ed.) 276. Thus, though the actual transfer of the realty occurs at the time of the performance of the last act requisite thereto, by a fiction in the law, it is carried back, if necessary to do justice between the parties, to the date of the agreement consummated by the transfer, but that has no reference to the rights of either party to the transaction as regards strangers thereto. In *Farmers' Mut. Ins. Co. v. Graybill,* 74 Pa. St. 17, lands on which there was an insured building were sold under judicial proceedings requiring confirmation to consummate the sale. After the sale and before such confirmation the buildings were injured by fire. Upon such confirmation and a deed being made pursuant thereto, by the doctrine of relation the transition of the land, for some purposes, was carried back to the date of the sale, but not so as to make any change in the legal relations between the former owner and the insurance company, which became fixed in the meantime. It was held that the cause of action to recover on the policy accrued to the former owner. This court held in *Stahl v. Lynn,* 86 Wis. 75, 56 N. W. 188, that the doctrine of relation is only invokable by one person against another with whom he is in privity as regards the

particular contract. The conclusion on this branch of the appeal must be that in case of a transfer of title to realty by mere operation of law upon the acts of the parties, the change of title occurs at the instant all the circumstances exist requisite thereto. The law, in legal contemplation, executes the will of the parties, and as it cannot operate till the last act on their part shall have occurred, indicating irrevocably such will, that is the earliest moment at which by such operation the transition of title takes place. In the meantime the former owner, except as the equitable doctrine of relation may be necessary to protect the latter and those in privity with him, remains the owner of the property.

What has been said really renders unnecessary the question of whether Mrs. Evans had authority to sell her husband's interest in the realty and convey the same to Kane, but we will briefly give attention to that subject.

The rule is familiar that a wife under some circumstances may act to some extent as agent by implied appointment for her husband, and that such is the case when the latter had left his property in possession of the former with no one to care therefor but her. In such a case the authority of the wife is not referable merely to the marital relation, for she has no authority to bind her husband by contract, generally, on that account. The authority springs from the apparent necessities of the situation and is limited in its scope to that which, under the circumstances, can be reasonably presumed to be the intentión of the husband. Her power to act at all is referable to a presumption of appointment and is fenced about, as in case of any other agency, by the apparent authority appropriate under the circumstances. In short, in contemplation of law the authority of the wife is based on the presumed intention of the husband. As that rests wholly in mere presumption, it goes no further than the customary authority which husbands usually confer under the same or similar circumstances. A very interesting discussion of that

subject is found in *Benjamin v. Benjamin,* 15 Conn. 347, cited to our attention by counsel. Beyond the authority mentioned the wife cannot bind her husband as agent *ex necessitate* regardless of whether her attempt to do so is or is not a judicious one from a business standpoint.

True, as said in effect in *Felker v. Emerson,* 16 Vt. 653, in case of extraordinary circumstances the presumed authority of the wife extends to all reasonable methods of meeting the extreme situation, but that is because such would be the natural inference as to what a husband would authorize to be done under such circumstances. But would that extend to permitting the wife in her discretion to sell the husband's real estate? We think not. It has never been held that it would so extend by any court that has dealt with the subject, so far as we can discover. Husbands do not usually, when absenting themselves from home so as to leave the entire care of their property to their wives, give the latter authority, in their own judgment, under any circumstances to sell and convey the realty. No such authority can be implied from the unexplained absence of the husband for any length of time. We state that as a legal principle, sufficiently established by the fact that there are no precedents to the contrary, and the fact that the requisites to a transfer of realty are such that authority of an agent to make such a transfer cannot rest on mere implication. That is consistent with all said in *Butts v. Newton,* 29 Wis. 632, and the other authorities called to our attention by appellant's counsel.

But it is argued by appellant's counsel that in case of an unauthorized transfer by a wife of her husband's property he will be bound unless he seasonably disavows her act, and to that authorities are cited to the effect that when a wife in the absence of her husband contracts for his benefit and the benefit comes to his possession he will be bound unless within a reasonable time after becoming acquainted with the facts he disavows her act. *Hill v. Sewald,* 53 Pa. St. 271; *Ber-*

wick v. Dusenberry, 32 How. Pr. 348. That hardly fits this case because the proof does not show that the benefit of Mrs. Evans's contract came to the hands of respondent. When a wife, assuming to act for her husband but without authority so to do, contracts for her own benefit, ratification does not spring from neglect to disavow but from some affirmative recognition of her act as having been done by authority.

Error is assigned because the court refused to change the answer to the first question of the special verdict so as to find Mrs. Evans was guilty of knowingly and with fraudulent intent swearing falsely in regard to the personal property destroyed, and further error is assigned as to instructions on that branch of the case. In our view neither of such assignments of error is important.

It is conceded that Mrs. Evans had authority, presumably from her husband, to make the proofs of loss. He was absent from home. He did not know of the fire till long after the time required for making the proofs. She was left in charge of the property. Under those circumstances it is held that the wife may make the proofs of loss by implied authority of the husband, as his agent *ex necessitate. O'Conner v. Hartford F. Ins. Co.* 31 Wis. 160. The appellant in this case recognized that rule, received the proofs of loss made by Mrs. Evans, and defended upon the ground that fraudulent false swearing by the agent in such a case without the knowledge of the principal, in doing that which the former by implied authority is authorized to do in a proper manner, is to all intents and purposes the fraud of the latter; that the employment of an agent carries with it apparent authority to do all that the agent does in carrying out the object of the agency. True, the general rule is that a principal is bound by the acts of his agent within the scope or object of the employment, though such acts include false and fraudulent representations made in the course of such employment to accomplish its object, of which the principal has no knowl-

edge. Mechem, Agency, § 743; *Cobb v. Simon,* 124 Wis. 467, 102 N. W. 891. However, it is considered that the law is somewhat more tender of the interests of a principal who makes no appointment of an agent in fact but for whose benefit the law raises an implication of one, as in this case; that, on principle, the scope of the employment does not include acts which will defeat the very equity of the law in respect to the implied authority.

As a further answer to counsel's contention above discussed it seems that the construction of the policy clause to the effect that false swearing on the part of the assured will work a forfeiture, adopted in *Metzger v. Manchester F. Assur. Co.* 102 Mich. 334, 63 N. W. 650, is sound as regards an agency *ex necessitate.* We go no further than the facts of this case in adopting that view. That court held, under the rule that forfeitures are not favored in the law, that the policy clause referred to should be strictly construed and held not to apply to false swearing on the part of the agent for the assured, unless the latter is actually a party to the deceit by either authorizing it in advance or subsequently ratifying it. To the same general effect is *Mullin v. Vermont Mut. F. Ins. Co.* 58 Vt. 113, 4 Atl. 817. There it was held that the principal participated in the deceit of his wife, who acted as his agent, by taking her statement of household effects lost by fire and swearing to it as true without investigation. In the instant case it must be remembered that there was neither an express turning over by the principal to the wife as agent, of the matter of making the proofs of loss, nor a careless omission to verify her statement before it was delivered to the appellant. There was merely an agency, implied by law,—one arising from the necessities of the case to do the act essential to preserve the cause of action under the policy, to recover for the loss. In such circumstances nothing short of ratification with knowledge of the facts should be held to operate as an adop-

tion by the principal of the acts of the agent outside of those necessary to execute the object of the agency.

It is claimed that respondent did ratify what was done by his wife in taking up the litigation commenced by her, after his return, and pursuing it to judgment without withdrawing so much of the claim as was fraudulently made, if any. It does not seem so. He found the cause of action at issue in respect to the claim of fraud. There is nothing to show that he did not take up the matter, in good faith, where he found it. He was not obliged, at his peril, to take the allegations which he found in appellant's answer as true. The questions as agreed upon, submitted to the jury, did not contain any inquiry on this subject. So it must be assumed, from the attitude of counsel at the trial, that there was no such question then supposed to be involved. Certainly, under the circumstances, there was no ratification as a matter of law and the court did not commit any error in not submitting to the jury a question in respect to the subject, as matter of fact.

As before indicated, our view of the case renders it unnecessary to discuss the subject argued at much length in the briefs of counsel as to whether the answer to the first question in the special verdict has credible evidence to support it. We do not pass on that. If the proofs of loss included property not injured or destroyed it was all eliminated by the verdict, and the inclusion of it, whether by mistake or fraud, under the circumstances, did not work a forfeiture as to the respondent.

By the Court.—The judgment is affirmed.

TRESEDER, Trustee, Respondent, vs. BURGOR and wife, Appellants.

November 12—December 4, 1906.

Bankruptcy: Fraudulent conveyances: Rights of trustee: Distribution of assets: Jurisdiction of federal court: Pleading: Deeds: Equitable mortgage: Findings: Evidence.

1. It is sufficient to authorize the trustee of a bankrupt to maintain an action to set aside a conveyance that the transfer was fraudulent as against creditors existing at the time it was made.
2. In such case, whether or not subsequent creditors can participate in the assets recovered by the trustee is immaterial so far as the trustee's right to maintain the action is concerned.
3. In such case the adjudication of the question how the fruits of the litigation shall be distributed among creditors is for the federal court in which the bankruptcy proceedings are pending.
4. In an action by a trustee in bankruptcy to set aside a conveyance because fraudulent as to creditors, a complaint showing a cause of action to set aside the conveyance upon the ground that it was, at least, fraudulent as to some creditors, is *held* sufficient.
5. In an action by a trustee in bankruptcy to set aside a deed as fraudulent as to creditors, the evidence, stated in the opinion, is *held* to sustain findings that the deed was valid only as an equitable mortgage to secure the bankrupt's actual indebtedness to the grantee, and that such indebtedness was only $380.

APPEAL from a judgment of the circuit court for Richland county: GEORGE CLEMENTSON, Circuit Judge. *Affirmed.*

This action is in the nature of a creditor's bill, brought by a trustee in bankruptcy to set aside, on the ground that the same was fraudulent as to creditors, a certain deed made by defendant *N. H. Burgor* to his wife and codefendant, *Mattie Burgor,* of a piece of real estate situated in the village of Viola upon which are located two business buildings, one used as a drug store and the other as a bank building. The deed was made October 26, 1903, and recorded within a day or so thereafter. November 6, 1905, defendant *N. H. Burgor,* who for many years had been doing business as a merchant and private banker at Viola, filed a petition in vol-

untary bankruptcy and was, on November 20, 1905, duly adjudicated a bankrupt. His liabilities as scheduled were upwards of $20,000, and his assets as appraised were about $7,500. The complaint alleges that he was insolvent on the date of the deed. Separate answers were made by defendants, *Mattie Burgor* denying all the allegations of fraud and fraudulent knowledge upon her part at the time of taking the deed, and alleging that the deed was, in fact, executed to secure her for the payment of various sums of money which she had furnished and loaned her husband from her separate estate in former years, and which, on the date of deed, amounted, including accumulated interest, to $2,221.66, said answer asking that the deed be decreed to be an equitable mortgage for the amount found due her, and such amount made a lien upon the premises prior to any lien decreed in plaintiff's favor representing the creditors of her husband. The answer of defendant *N. H. Burgor* is substantially the same, alleging the receipt of money at various times from his wife, which had never been repaid, and that the deed of October 26, 1903, was intended to secure her for said loans. The case was tried by the court, and the court found that the defendant *N. H. Burgor* was indebted to his wife on the date of the deed in the sum of $380 only, and that the conveyance was void as to creditors, except as to defendant *Mattie Burgor's* lien thereon for said sum, and that as to said sum the deed is an equitable mortgage. Judgment was entered on the findings of the court awarding plaintiff costs, and the amount of the costs as taxed was ordered to be deducted from the said $380, leaving $311.33 and interest to be paid to defendant *Mattie Burgor* by plaintiff before taking possession of said premises, from which judgment this appeal was taken.

For the appellants there was a brief by *C. W. Graves, L. H. Bancroft,* and *F. W. Burnham,* and oral argument by *Mr. Bancroft.*

George W. Bunge, for the respondent.

KERWIN, J. The errors assigned may be considered under two heads: (1) That the court erred in overruling the defendants' objection to the admission of any testimony under the complaint. (2) That the findings are not supported by the evidence.

1. It is contended by counsel for appellants that plaintiff in his representative capacity as trustee in bankruptcy of the estate of defendant *N. H. Burgor* represented two classes of creditors: (a) a class entitled to set aside the deed as fraudulent upon sufficient testimony, because they were creditors at the time of the execution of the deed; and (b) a class not entitled to set the deed aside, because they had become creditors after the alleged fraudulent transfer. And it is argued that the plaintiff representing creditors can only have relief for the first class, and the trial court could not undertake to determine that some could participate in the fruits of the litigation and others not. We are unable to agree with counsel for appellants in this contention. It is sufficient to authorize the trustee to maintain the action that the transfer was fraudulent as against creditors existing at the time it was made, and whether or not subsequent creditors can participate in the assets recovered by the trustee is entirely immaterial so far as the trustee's right to maintain the action is concerned. *Valley L. Co. v. Hogan,* 85 Wis. 366, 55 N. W. 415; *Jackman v. Eau Claire Nat. Bank,* 125 Wis. 465, 104 N. W. 98. The judgment in this case does not determine or adjudicate how the fruits of the litigation shall be distributed among creditors. That is a question for the federal court in which the bankruptcy proceedings are pending. *In re Cannon,* 121 Fed. 582. The complaint in this case clearly shows a cause of action to set aside the deed in question upon the ground that the conveyance was, at least, fraudulent as to some creditors, and that is sufficient to constitute a good complaint by the trustee in bankruptcy to set aside a conveyance fraudulent as to creditors.

2. The court found, in effect, that the amount due defendant *Mattie Burgor* at the time of the conveyance was $380; that claims filed and allowed against the estate of defendant *N. H. Burgor* in the United States district court before the commencement of this action exceeded the sum of $20,000; that the assets in the hands of the trustee will be insufficient to pay the debts of the said bankrupt by more than $12,000; that the only consideration for the transfer to defendant *Mattie Burgor* was an indebtedness of $400 deposited with said defendant *N. H. Burgor* in August, 1903; and that prior to the time defendant *N. H. Burgor* was adjudged a bankrupt he paid defendant *Mattie Burgor* on said indebtedness all except $380. The court made several other findings to the effect that the defendant *N. H. Burgor,* prior to the time he was adjudged a bankrupt, was doing a banking business at all times after the year 1891 until about August, 1903, and during said time made reports of his financial condition to the authorities of the state of Wisconsin, and regularly several times each year published in a newspaper in the state of Wisconsin his financial condition, stating the total amount of his assets and liabilities; that in such reports and publications he never mentioned or included in the total amount of his liabilities any debts to defendant *Mattie Burgor;* that defendant *Mattie Burgor* knew of such reports, and saw and read said publications of *N. H. Burgor's* financial condition, and knew that such publications did not include any debt or liability to her. The court further found that at the time of the conveyance to defendant *Mattie Burgor* it was agreed that defendant *N. H. Burgor* should retain possession and control of the premises and some interest therein contrary to the terms of the conveyance; that said conveyance should be by the defendants pretended to be a complete conveyance of all the rights of *N. H. Burgor* to defendant *Mattie Burgor* as against creditors and other persons, and was made pursuant to such agreement; that pursuant to such agreement, and until the

commencement of this action, defendant *N. H. Burgor* remained in exclusive control and possession of said premises; that defendants gave out and represented that the conveyance was an absolute conveyance of all *N. H. Burgor's* interest in said premises. Certain findings were proposed by appellants to the effect that the indebtedness from defendant *N. H. Burgor* to defendant *Mattie Burgor* at the time of the execution of the deed was much more than $100.

The court found as conclusions of law that the conveyance was void as against the plaintiff, except that the same was valid in favor of the defendant *Mattie Burgor* as an equitable mortgage to secure $380, the amount found due her with interest at six per cent. per annum from October 26, 1903. We need not consider upon this appeal whether the conveyance was void as to creditors, because of a trust created in favor of the grantor under sec. 2306, Stats. 1898. If we are called upon to determine this question, we might have some difficulty in sustaining the deed in view of the findings of fact below. But since the judgment is not complained of by respondent, if the findings as to the amount due from defendant *N. H. Burgor* to defendant *Mattie Burgor* are supported by the evidence, we are relieved from the necessity of considering the question. There can be no doubt, under the evidence and findings, that the deed, if valid at all, can only be effectual to the extent of securing the defendant *Mattie Burgor* for the amount of indebtedness due from *N. H. Burgor* at the time the conveyance was made. In fact, as we understand appellants' contention, it was conceded upon the trial that the deed was not intended as an absolute conveyance, but was given as security for the indebtedness from defendant *N. H. Burgor* to defendant *Mattie Burgor*. It therefore becomes necessary to consider only whether the findings of the court respecting the amount of the indebtedness are sustained by the evidence.

After a careful examination of the testimony we are unable to say that the findings upon this point are not supported

by the evidence. The defendant *Mattie Burgor* claimed on the trial several items of loan to the defendant *N. H. Burgor* as follows: $500 in February, 1883, $333 in December, 1900, $100 December 23, 1902, and $400 in August, 1903. The testimony respecting these alleged loans is exceedingly vague and indefinite. No entry appears to have been made of any of them, except the $333 item and the $100 item, and there is testimony to the effect that the $333 item was charged off the books or paid. It is admitted that she never received any note or other obligation for any of these sums not appearing on the books, and never asked for any. So that the only item remaining of which any record was preserved is the $400. She says there was no agreement made that her husband should ever pay it back at the time it was given to him. The evidence does not disclose that defendant *Mattie Burgor* ever demanded payment of any of these items, at least not until about the time the deed was made. There is also some evidence to the effect that some of this money claimed to have been loaned was expended by defendant *Mattie Burgor* for other purposes, but how much does not appear. It also appears from the evidence that neither of the defendants could state the exact amount of the indebtedness; that at the time the deed was made the defendant *N. H. Burgor* was insolvent, and that he continued to do business thereafter, rendering financial statements of his liabilities without including any liability to defendant *Mattie Burgor,* and that she knew, or ought to have known, of such statements.

There is some confusion in the testimony as to the $333—whether it was drawn out by her or not. She testified:

"I suppose he put the $333 in the bank. I don't know that I ever drew it out. I would have to think about that a little, but I don't think that I ever did. I would not be sure about it. I might have drawn a little out, but not very much of it."

However, it appears that it was all charged off the books. It also appears that *Mrs. Burgor* got back some money from her husband, but the evidence does not show the exact amount. The failure to include this money on the books as an indebtedness to *Mrs. Burgor* largely increased the assets of *Mr. Burgor* in his banking business, which he was running on a very small capital, and thereby enabled him to hold himself out to his creditors upon a false basis, and put him in position to obtain credit on a basis of assets which he did not possess, and get credit which doubtless he could not have gotten had the additional liability of the amount claimed by defendant *Mattie Burgor* appeared. We think, therefore, the fair inference from all the testimony is that whatever money *Mrs. Burgor* advanced to her husband aside from the $400 was clearly intended as a gift and not as a loan. It does not appear even that she asked for the deed as security, but that it was executed to her at the instance of her father. The fact, too, that the $333 was entered in the books and afterwards checked out or charged off would appear at least to raise the inference that if any other indebtedness existed aside from the $400 it would in some way appear upon the books. All the testimony seems strongly to tend to the conclusion that at the time the money was advanced and until at or about the time defendant *N. H. Burgor* became bankrupt there was no thought on the part of *Mrs. Burgor* or her husband to treat the money advanced, if it were advanced, as a loan, and that it never would have been so treated had *Mr. Burgor* been successful in business, and that the idea of transferring the property emanated from *Mrs. Burgor's* father and not from her. Moreover, it appears that when the property was transferred nothing was said indicating that she should take it as security, and defendant *Burgor's* schedule in bankruptcy did not show that he had any interest in the property, and *Mrs. Burgor* made claim for the rent for the use and occupation of the premises.

Upon the whole evidence we are unable to say that there is such a clear preponderance of the testimony against the findings of the court below respecting the amount of indebtedness of defendant *N. H. Burgor* to defendant *Mattie Burgor* at the time of the execution of the deed as would justify this court in disturbing them. This being so, it necessarily follows that the appellants cannot complain of the judgment.

By the Court.—The judgment of the court below is affirmed.

LONGWELL, Administrator, Respondent, vs. MIEROW, Executrix, Appellant.

November 13—December 4, 1906.

Executors and administrators: Claims against decedent: Sufficiency: Amendment: County courts: Discretion: Evidence.

1. Where a claim filed against a decedent's estate included enough to suggest that it was based on an agreement of some sort and that the right thereunder was not barred by the statute of limitations, in view of the liberal rules in respect to the method of presenting such claims in the county courts, and the treatment of the filed claim as a complaint on an appeal to the circuit court, a failure to state therein facts showing expressly a cause of action which accrued within six years prior to the death of decedent is *held* to be a matter of indefiniteness rather than a fatal defect in the cause of action.
2. In such case it was within the court's discretion to allow an amendment alleging that the claim was to mature on the death of the decedent.
3. In such case, the amendment having been allowed, the fact that it was not formally reduced to writing and filed is *held* to be immaterial, in view of the fact that the cause proceeded to the end on the theory that the amendment had been made.
4. So long as a cause is under the control of the trial court the power of amendment is within the broad limits of judicial discretion, subject, however, to the general limitations that the form of the action must not be changed from equity to law or from contract to tort, and also that the amendment must not contain an independent cause of action accruing pending the

suit, must be in furtherance of justice, and must be allowed in such manner as not, in a legal sense, to prejudice the rights of the adverse party.

5. In an action against a decedent's estate to recover the value of services rendered on an express agreement to pay for the services at the decedent's death, the evidence, stated in the opinion, is *held* to sustain a verdict in favor of the claimant.

APPEAL from a judgment of the circuit court for Monroe county: J. J. FRUIT, Circuit Judge. *Affirmed.*

Action to recover on contract. Henry C. Mierow filed a claim in the county court of Monroe county against the estate of his father, Henry Mierow, which was in process of settlement. There were two items in such claim, viz., $900 for three years' work performed for the deceased, commencing in 1872 and ending in 1875, and $5,100 for seventeen years' work, commencing in 1878 and ending in 1895. The decision in the county court was in favor of the plaintiff and due appeal was taken therefrom by the adverse party to the circuit court for Monroe county, and before the trial there the claimant died and the cause of action was duly revived in favor of his personal representative. Upon an objection to any evidence in support of the claim being made on the trial by the executrix, an amendment was allowed to the effect that the second item accrued pursuant to an agreement that Henry C. Mierow should be paid for his labor upon the death of Henry Mierow. That was duly excepted to. The cause was submitted to the jury for a special verdict on undisputed evidence as to Henry C. Mierow having worked on his father's farm for the period covered by the second item of the claim and a conflict of evidence, as the court viewed the matter, as to whether the work was done under an express agreement that it should be paid for at the death of Henry Mierow. It was claimed on the part of the plaintiff that there was evidence tending to show such an agreement, and it was claimed on the part of the executrix that the evidence showed that no agreement was made to pay for the work, as

alleged, but that it was performed by Henry C. Mierow as a tenant, working his father's farm on shares; or, if there was any agreement at all to pay for the work, it was to do so by leaving Henry C. Mierow property, real and personal, by will. The jury found: 1. Henry C. Mierow did not labor on his father's farm from 1875 till he left the same in 1895 working it on shares. 2. The work was not done under an agreement that the same should be paid for by Henry Mierow leaving his property, real and personal, to his son Henry C. Mierow. 3. When the work commenced in 1878 Henry Mierow agreed to pay his son for the latter's work at the former's death. 4. The reasonable value of the work was $1,225.

Judgment on the verdict was rendered in plaintiff's favor and the defendant appealed; due proceedings having been taken to save for review various questions and among them those urged upon the appeal, as indicated in the opinion.

For the appellant there was a brief by *Thorwald P. Abel* and *Higbee & Higbee,* and oral argument by *Mr. Abel* and *Mr. J. E. Higbee.*

For the respondent there was a brief by *A. H. Smith,* attorney, and *F. J. Smith,* of counsel, and oral argument by *Mr. A. H. Smith.*

MARSHALL, J. The claim as presented to the county court and to the circuit court did not contain any statement of the agreement out of which it originated, yet such claim included enough to suggest that it was based on an agreement of some sort and that the right thereunder was not barred by the statute of limitations. In view of this and the liberal rules in respect to such matters in county courts and the treatment of the filed claim as a complaint on appeal to the circuit court, we are constrained to hold that the failure to state therein facts showing expressly a cause of action which accrued within six years prior to the death of Henry Mierow was a matter of indefiniteness rather than a fatal defect in

the cause of action. It is quite likely that the trial court took that view in allowing the indefiniteness to be removed by adding to the writing a statement that the work was done under an agreement that it should be paid for upon the death of Henry Mierow. In any event, it seems that it was within the court's discretion to allow the amendment, and, it having been allowed, the fact that it was not formally reduced to writing and filed, inasmuch as the cause proceeded to the end on the theory that it had been made, is immaterial. Trial courts have a very broad discretion in such matters, as this court has often said. The limits, generally speaking, are that the form of the action must not be changed from one in equity to one at law, nor from one on contract to one sounding in tort, nor contain an independent cause of action accruing pending the suit, and the amendment must be in furtherance of justice and allowed in such manner as not, in a legal sense, to prejudice the rights of the adverse party. *Gates v. Paul,* 117 Wis. 170, 94 N. W. 55. Subject to such limitations the power of amendment is fenced about only by the broad limits of judicial discretion, so long as the cause is under the control of the court invoked in respect to the subject. Such is the broad liberal spirit of the Code, designed in all its parts to furnish a way to prevent mistakes and technicalities from efficiently interfering with the course of justice.

The test to be applied to the evidence in solving the controversy as to whether there was an express agreement to pay for the work as found by the jury is this: Is there room in the evidence for reasonable minds to reasonably differ as to whether there was such an agreement or not, reasonable doubts in respect to the matter to be solved in favor of the decision of the trial judge? That is elementary. We have occasion to state the rule and apply it so frequently that it would be a work of supererogation to do more than to refer thereto.

This class of cases is always characterized by much dif-

ficulty as regards certainty in the evidence. It having been established as the settled law that in such a case an express agreement to pay for the labor is essential to a recovery, but that it is competent to establish the agreement by circumstantial evidence from which the agreement is reasonably inferable (*Estate of Kessler,* 87 Wis. 660, 59 N. W. 129; *Leitgabel v. Belt,* 108 Wis. 107, 83 N. W. 1111), and that declarations of the deceased together with suggestive circumstances may properly be regarded as controlling (*Leitgabel v. Belt, supra*), it is easy to see how wide the door is open for the introduction of evidence of a quite unsatisfactory character, as viewed here, but of sufficient probative force that this court in face of a decision of the trial court, who heard it, cannot condemn it as not being worthy of any credence at all. Such claims as this are commonly established by the circumstance that the work was actually done and proof by various persons, having little or no interest in or occasion to charge their minds with the matter, of declarations of the deceased made to them on the subject. *Tyler v. Burrington,* 39 Wis. 376, 382; *Estate of Kessler, supra.* Generally such declarations are made in casual conversation, and when there are many instances testified to by many persons the statements of the different witnesses commonly vary quite materially, one class testifying in general to declarations indicating the existence of an express contract and others to declarations indicating the contrary, and the two classes varying more or less between themselves, making, in the ultimate, a conflict which leaves the truth of the matter, as the case is exhibited in a printed record of the trial, quite close to the border line of mere conjecture, and yet facing the decision of the trial court and according thereto the dignity it deserves the duty of the appellate tribunal be quite clear to affirm such decision.

In this case, as claimed on behalf of appellant, there is considerable evidence indicating that Henry C. Mierow dur-

ing the period covered by his claim labored on his father's farm, working the same on shares. With that concession it is needless to refer to the evidence in detail, if there be other evidence conflicting therewith, justifying sending the matter to the jury. It seems that there was considerable evidence to the effect that the labor was performed with an understanding that compensation would be rendered therefor by a provision devising and bequeathing property, and evidence suggesting with more or less force, according to the standpoint from which it is viewed, that the labor was performed under an express agreement that it should be paid for according to its reasonable value at the death of Henry Mierow. There was testimony by John McCance and others that Henry Mierow was the "boss" of the farm, as the witnesses put it, and his son Henry C. a mere servant; that he worked like any hired man and that the father directed all operations and employed and paid for all outside help. There was evidence by Mrs. Puls and others to the effect that Henry Mierow said to or in the presence of each that Henry C. would be, or was to be, paid for his labor at the death of the former; that such was the agreement, as one witness put it. Now, in view of this evidence and the evidence, contradicted it is true by other evidence, that the son worked for his father seemingly like any hired man, and the circumstance, as to which there is no controversy, that, although he left the farm in 1895, he made no claim for compensation till after the father died, thereby allowing his claim, if he had one, to be extinguished by the statute of limitations, unless the nature of it was as found, we are unable to say that the trial court was manifestly wrong in submitting the cause to the jury or in confirming the verdict.

As no question is raised respecting the reasonable value of the work, as found by the jury, the foregoing disposes of all matters material to the appeal in favor of the respondent.

By the Court.—The judgment is affirmed.

NELSON, Administratrix, Respondent, vs. CHICAGO & NORTHWESTERN RAILWAY COMPANY, Appellant.

November 13—December 4, 1906.

Evidence: Expert testimony: Witnesses: Examination of experts: Hypothetical questions: Competency: Paralysis: Railroads: Negligence in carrying passenger by his station: Contributory negligence: Proximate cause: Anticipation of injury: Instructions to jury: Prejudicial error.

1. On the examination of an expert witness, omission to state in a hypothetical question details of evidentiary circumstances and conditions, which, though bearing on the inquiry propounded, are, however, merely cumulative of that which the hypothesis includes, does not affect the competency of the question nor the answer thereto, since the expert must be presumed to have taken into consideration all the facts expressly stated and necessarily implied.
2. On an issue as to whether an illness suffered by plaintiff had been aggravated by his being carried by his station on defendant's train (he thereafter having become permanently paralyzed), it is not error to take the opinion of physicians as to plaintiff's condition and to state the progress of his illness to the time he was carried by his station, without including his condition from that time to the time he became permanently paralyzed, where the opinion asked for was based on a series of facts understood and relied upon as descriptive and symptomatic of brain lesion and cerebral hemorrhage, and said to be known and relied upon in medical science.
3. In such case testimony of the physicians that the facts proven showed a stoppage of the hemorrhage causing the paralysis on the day plaintiff was carried by his station and a renewal thereafter, is not wholly incredible or conjectural and is within the field of opinion evidence,—the physicians having testified that a knowledge of the progress of the ailment throughout its history enabled them to know at any stage of the trouble, by an arrest of the progress of the paralysis, whether the incipient hemorrhage had ceased, although they admitted that the extent of the hemorrhage, when it had once commenced and continues, what it might result in, and the prognosis, might be uncertain.
4. In such case testimony of the physicians as to plaintiff's condition after he had been carried by his station and up to the time his attending physician saw him is *held* competent.

5. In such case a verdict in favor of plaintiff is *held* to be supported by evidence tending to show that plaintiff was injured by defendant's negligence in carrying plaintiff by his station.
6. Where a passenger, unknown to himself, was in fact suffering from a brain lesion accompanied by cerebral hemorrhage when he was carried by his railroad station, failure to seek medical advice and assistance at the place he left the train and walking around while waiting for the train which took him home do not show contributory negligence as matter of law, and that question was properly submitted to the jury.
7. In an action against a railroad company by a passenger suffering from incipient paralysis who was carried by his station and thereby the disease was so aggravated that complete paralysis ensued, the court submitted without comment or explanation a question of the special verdict inquiring whether the aggravation of plaintiff's condition was the natural and probable result of defendant's negligence, and then proceeded to read a question inquiring whether defendant ought to have anticipated some injury from its acts. Thereupon the court instructed the jury: "It is not necessary in answering this question for you to find that at that time, by reason of his being carried by, that aggravated paralysis might be the natural and probable result of such negligence, but it is sufficient if it now appears to have been a natural and probable consequence of such negligent act, if you find that it was a negligent act." *Held*, that thereby the court confused the ideas of proximate cause embodied in the questions of the special verdict, and failed to observe the distinction between the two elements as there set out.
8. In such case the error is *held* not prejudicial, since under the facts found by the jury reasonable anticipation of injury was the only element necessary to establish liability, and under the evidence, stated in the opinion, the court should have held, as matter of law, that the fact of anticipation was established.

APPEAL from a judgment of the circuit court for La Crosse county: J. J. FRUIT, Circuit Judge. *Affirmed.*

An action to recover for injuries which plaintiff's intestate is alleged to have sustained through the defendant's negligence. On February 20, 1903, Nels R. Nelson was a passenger for hire on defendant's train from Mankato, Minnesota, to La Crosse, Wisconsin. This train was due at La Crosse at 10:45 p. m. When it arrived at La Crosse Nelson was carried by, and at about midnight was left at West Sa-

lem, the next station, twelve miles distant from La Crosse. Here he remained the rest of the night and the following day. It is alleged that he was ill at this time, and that defendant's negligence increased and aggravated his illness, which resulted in permanent paralysis. The material facts of the case, which the evidence tended to establish, are as follows: Nelson resided at La Crosse, Wisconsin, and was a traveling salesman. On Sunday evening, February 15, 1903, he left home on a trip into Minnesota and arrived at Wells, Minnesota, Monday morning, where he stayed to transact some business. He left for Easton Tuesday morning. After his arrival he transacted some business and left there at 11:30 p. m. for Delavan, the next station, a short distance west, where he remained until the 5 p. m. passenger train, when he went to Winnebago City, arriving there shortly before 6 o'clock. After his arrival he partook of supper, and a short time afterward first began to feel somewhat ill. He says: "I felt trembling, shaky, sort of chill, if I may call it that, and sick at my stomach." About 9 o'clock he retired, but did not sleep well. He felt somewhat ill the next morning, but went to Elmore on an early morning train, and, arriving there about 9 o'clock, visited some customers during the forenoon, and then for the first time observed that he could not move and handle his left arm and leg as well as usual—they seemed more difficult to control. At about 2 o'clock in the afternoon he took a train from Elmore to Mankato to go home. At Mankato, where he arrived between 4 and 5 o'clock, he needed assistance to get off the train, and he says he needed this assistance because "I could not handle my arm and leg. I could not step down from the steps to the platform without some assistance." Two traveling men assisted him off the train by taking hold of his arms, one on each side, and then assisted him to the hotel, which was across the street and railway tracks from the station. At the hotel he wrote his name on the register, and then, with

the porter's assistance, walked to the elevator and thence to his room. He remained in his room during the evening, the night, and the following forenoon. In the evening he partook of a little lunch in his room, and retired about 9 o'clock, the porter assisting him to remove his clothing and to get into bed. About noon of the following day he arose, dressed, and, with the porter's assistance, walked downstairs. In the afternoon, at about 2 o'clock, he left the hotel to walk to the depot. The two men who had helped him off the train the day before again assisted him to the depot. At this time he found that his leg and arm were in about the same condition as the day previous. Mentally he felt no ill effects, and, so far as he could tell, his faculties were not clouded or dulled. At about 2 o'clock he was assisted in getting onto the train and into the coach of the train for La Crosse, where, excepting for a short stop at Winona, he remained until he landed at West Salem. At about 9 o'clock in the evening he got off the train at Winona, went to a lunchroom for some lunch, and then returned to the car. Here he received some help from a gentleman in mounting the step of the car. He resumed his place in the car, and after leaving the station told the conductor that he was not well and wanted to get home, and requested that he be called in order to get off the train at La Crosse. The persons in charge of the train and car wherein plaintiff rode were thus informed of his illness and of his desire to get off the train at La Crosse.

He did not hear the call for La Crosse, and did not discover this fact until the train had passed La Crosse. He then put on his overshoes, got up, walked to the conductor in the front end of the car, and stated that he wanted to get off at La Crosse. The conductor informed him that they had passed La Crosse, and that he could not let him off at the place where they were, but must take him to the next station, West Salem. This angered him somewhat, but he soon became composed and resumed his seat and rode to West Sa-

lem. Here he got off the train, the conductor and Mr. Wood, the hotel keeper at this place, helping him off, and Mr. Wood assisted him in walking to the hotel. This was between 11 and 12 o'clock. Mr. Wood provided him with lodging by having him occupy a room with a Mr. Larson, with whom Nelson had been intimately acquainted for a number of years. Nelson states that he felt sick, weak, and tired, and was in about the same condition as theretofore; that he did not know the nature of his affliction and how serious it was, but that he was somewhat frightened and anxious to get home to get help. He says he undressed to retire without Larson's assistance; but Larson states that he had observed that Nelson was lame, and that he helped him to remove his shoes and clothing and to retire. Nelson states that he did not sleep well; that he was restive and nervous; that he awoke at 6 o'clock in the morning, felt fatigued, had no appetite, wanted no breakfast; that his left leg and his arm were unruly and would not take hold of anything like his right arm; and that, excepting that he got up and went to the toilet for a drink of water, he remained in his bed until about 3 o'clock in the afternoon. Larson assisted him to dress when he got up in the afternoon. They conversed somewhat, and Larson says that Nelson's mind was somewhat dazed, and he was not as he was before. He helped him downstairs. Nelson stated that he wanted to go home on the train leaving about 5 o'clock. With Larson's assistance he walked from the hotel to Johnson's store, where he recognized and spoke to persons he had known. They then returned to the hotel, and, with Larson's help, he walked into the dining room, where he partook of some tea and toast. Larson testifies that he observed his face and noticed that the left side of his mouth dropped, and that, when he attempted to drink tea, some of it escaped from this side of his mouth. After supper he reclined on a lounge until about 7 o'clock, when they went to the train. Larson and another

gentleman assisted him to walk to the train and put him on board. Larson went with him to La Crosse, where he and the brakeman helped Nelson off the train. Larson and a hackman helped him into a hack, took him to his home, and helped him into the house, when Larson and the members of the family immediately assisted him upstairs. Larson testifies that they half carried and that he half walked up stairs to his bedroom, where the family helped to undress and assist him to bed. Dr. Gunderson was immediately called and soon appeared. He examined him and describes him as being numb in the whole left side of his body, including the tongue and face. He could move his left arm and foot somewhat, but was weak and feeble; tongue would fall to one side; was able to talk; sensorium a little cloudy, not as bright as before; thought he was suffering from quite a severe hemorrhage, which was increasing. During the first twenty-four hours he became so entirely paralyzed that he could not move his whole left side. His mind was a little cloudy, and he thought he would not recover from the ailment.

Nelson was well acquainted with the hotel keeper, Wood, Mr. Larson, and others at West Salem. He knew that there was telegraphic communication with La Crosse and telephonic connection between the hotel and his home. He was acquainted with the physicians in practice there. He sought no medical aid at this place, nor did he send for members of his family or his family physician at La Crosse. The opinion evidence of the physicians was to the effect that paralysis is caused by the rupture of a blood vessel in the brain. This permits suffusion of the blood and consequent pressure on the brain, destroying or impairing the centers of motion or sensation. The degree of paralysis depends upon the extent of the hemorrhage. The extent of the hemorrhage is judged by the indirect symptoms of the degree of impairment of motion and sensation. The progress of the hemorrhage and its cessation and recurrence can be diagnosed

only by the variations of these paralytic symptoms. The approved medical treatment is to keep the patient and his environment as quiet as possible, place him in a reclining position with the face upright, his head slightly elevated, to apply packs of ice to his head, and to evacuate his bowels. Excitement of the brain and nervous system from fright, anger, motion, or intense mental strain are injurious to the patient in the early stages of the ailment and tend to produce a recurrence of the hemorrhage. The causes producing the lesions of the brain and the resulting paralysis are not definitely known. It comes to persons under all circumstances and conditions, varying from extreme shocks, violent motion, and excitement to conditions of absence of shock, absolute quiet and repose, both mental and physical. In response to hypothetical questions based on the evidence adduced, the physicians gave it as their opinion that on Tuesday evening Nelson suffered a slight paralysis from a hemorrhage which soon reached its climax, and that it had stopped flowing before Thursday evening when he arrived at La Crosse; that his condition kept growing worse during the night and day at West Salem and upon his return home Friday night; that this aggravation of his condition indicated a recurrence of the hemorrhage; and that such a result was caused by the excitement incident to the worry, physical efforts, and mental strain to which he was subjected by being taken to West Salem, his stay there, and his return to La Crosse, and the consequent delay in receiving care, rest, quiet, and appropriate treatment at his home.

The case was submitted to the jury by a special verdict. They found that defendant was negligent in carrying Nelson by La Crosse; that from being so carried by his paralysis was aggravated; that such aggravation of Nelson's paralysis was the natural and proximate result of defendant's negligence in carrying him by La Crosse; and that, in the light of the attending circumstances, a person of ordinary intelligence and

prudence ought to have foreseen that some injury might result to Nelson. The court awarded judgment for plaintiff on the verdict for the amount assessed by the jury, and for costs. This is an appeal from such judgment.

Edward M. Hyzer, for the appellant.

For the respondent there were briefs by *Morris & Hartwell* and *Winter & Esch,* and oral argument by *Thomas Morris* and *Frank Winter.*

SIEBECKER, J. The errors assigned for reversal of the judgment go to the sufficiency of the facts to establish that Nelson suffered an injury through defendant's negligence, the want of any evidentiary basis for the opinion evidence of the physicians examined as experts concerning any change in Nelson's condition after Thursday evening from what it had been theretofore, and to alleged fatal defects in the hypothetical questions propounded, in that they assumed facts inconsistent with undisputed evidence, and other facts which were mere speculations and conjectures, wholly unsupported by the evidence and contrary to all reasonable inferences from the facts in the case. It is also claimed that the hypotheses so assumed and propounded omitted many facts shown by the evidence which are necessary and essential to enable the expert to give an intelligent and correct opinion on the subject. In view of the nature of the injury complained of and the conditions surrounding it, a proper consideration of these questions necessitates a close scrutiny of the facts and circumstances adduced by the evidence to ascertain their logical and natural consequences. For this purpose the somewhat extended and detailed statement of the evidentiary facts, as heretofore given, is required as the basis for the inferences which are decisive of the questions raised. It may be well to consider first whether the hypothetical questions, as framed, omitted material and essential evidentiary facts, within the scope of the inquiries to which they were directed.

The facts, suggested under the objection as being material to the inquiry but omitted, are evidentiary circumstances and conditions, which, though bearing on the inquiry propounded, are, however, merely cumulative of what the hypothesis included, and are covered by the facts assumed. Omission to state them in detail cannot affect the competency of the question nor the answer thereto, since the expert must be presumed to have taken into consideration all the facts expressly stated and what they necessarily implied. We deem the questions sufficiently inclusive of all evidentiary facts within the scope of the inquiry.

It is urged with much force that it was clearly erroneous to take the opinion of physicians as to Nelson's condition and to state the progress of his illness up to the time he went through La Crosse on Thursday evening, without including his condition from this time to the time of his arrival at home on Friday evening. This contention rests principally on the ground that no correct and reliable inference can be made by experts, in cases of this nature, without taking into consideration all the events and facts descriptive of the illness from its inception to its most serious stage, and that from its nature it is impossible to ascertain the state and progress of the illness by the indirect symptoms of paralysis. We do not find the first of these claims well founded. The opinions asked for were based on a series of facts which are understood and relied on as descriptive and symptomatic of brain lesion and cerebral hemorrhage, and are said to be known and relied on in medical science. The argument that this may be conceded and yet leave the vital objection unanswered, namely, that none of the symptoms or conditions enables the expert to judge whether cerebral hemorrhage had ceased on Thursday, is answered by the testimony of the experts that the facts proven show a stoppage of the hemorrhage. The explanation of this conclusion, that, if it had not so ceased, Nelson's condition on Thursday would necessarily have varied and have grown more serious from time to time than it in

fact appeared, is not so against reason and common sense that it must be rejected as wholly incredible and conjectural. True the witnesses admitted that the extent of a hemorrhage in the brain, when it has once commenced and continues, what it may result in, and the prognosis, may be very uncertain, yet they testify that a knowledge of the progress of the ailment throughout its history enables them to know at any stage of the trouble by an arrest in the progress of the paralysis whether the incipient hemorrhage has ceased. An uninterrupted hemorrhage is said to be accompanied by marked symptoms of increasing paralysis. The attending physician and Dr. Callaghan both testify that the facts left no uncertainty as to Nelson's condition on Thursday, and that the hemorrhage had stopped on that day. They also testify that the case showed symptoms of a renewal of the hemorrhage after Thursday and before Friday evening. We find no objection to this class of testimony. It is clearly within the field of opinion evidence. Such inferences from abnormal conditions are not within the field of common knowledge, and can only be made by persons possessed of expert knowledge on the subject. These requirements were fulfilled by the witnesses produced, and their testimony was properly received in the case. Upon like considerations it must be held that the hypothetical questions propounded to the physicians as to Nelson's condition after he had been carried by La Crosse and up to the time the attending physician saw him the following Friday evening were not objectionable upon either of the grounds. Such testimony was properly received. With this testimony in the case, the contention that the verdict is not supported by evidence tending to show that Nelson was injured by defendant's negligence cannot be sustained. We find that the testimony, showing a change in Nelson's condition on Friday, is sufficiently clear in its tendency and effect. It appeared that his trouble had progressed to a worse and more serious stage from that of the day before. It also appeared that this aggravated condition was attributable

to the fact of his being subjected to the mental strain and excitement, and the physical exertions he had to undergo on account of his stay at, his traveling to and from, West Salem, and his failure to obtain the quiet, rest, and medical attention he would have had had be been at home during this time.

It is further claimed that Nelson was guilty of contributory negligence in his attempts to walk about West Salem and in his omission to procure the aid of a physician at West Salem or that of his family physician, whom he could have reached from this place. It appears that neither Nelson nor his friends understood the nature of his physical condition, nor were they apprised that he was suffering from a brain lesion accompanied by cerebral hemorrhage. He was not informed that his condition required immediate medical attention. He believed that the physical exercise taken by him was conducive to his improvement. Under such circumstances his failure to seek medical advice and assistance at West Salem and his conduct in walking about the place do not in themselves clearly show negligence on his part that the court could so declare it as matter of law, and the determination of the question required submission to the jury upon all the evidence in the case.

Error is assigned upon the court's instruction given the jury in connection with question 6 of the special verdict. Without comment or explanation the court read to them question 5, whereby they were to determine whether or not, if they found Nelson's condition was aggravated after he was carried by La Crosse, such aggravation was the natural and probable result of defendant's negligence, and then proceeded, reading to them question 6, which was if the jury found the aggravated condition referred to in the sixth question existed, and was attributable to defendant's negligence,

"then ought a person of ordinary intelligence and prudence to have foreseen that some injury might result to the plaintiff in the light of the attending circumstances."

And then instructed the jury:

"It is not necessary in answering this question for you to find that at that time, by reason of his being carried by, that aggravated paralysis might be the natural and probable result of such negligence, but it is sufficient if it now appears to have been a natural and probable consequence of such negligent act, if you find that it was a negligent act."

The objections urged to this instruction are that it confused the ideas of proximate cause, embodied in questions 5 and 6, and failed to preserve the distinction between the two elements as there set out. These criticisms are pertinent, and the course pursued by the court was clearly a misdirection, in that the jury were instructed to pursue a course of inquiry in arriving at the determination of these questions which is directly contrary to that given for ascertaining facts by question 6, namely, whether a person of ordinary intelligence and prudence, in the light of the circumstances surrounding the commission of the negligent acts, ought to have anticipated that such negligence might cause injury to some one. This fact the jury must ascertain from viewing the situation as presented at the time of the omission of the alleged duty, in the light of the circumstances attending such default, and is not to be inferred from the consequences thereof. It seems quite evident that the instruction was misleading and was improperly applied to the inquiry under question 6. However, another consideration upon this branch of the case obviates any prejudicial error such misdirection might otherwise have caused, namely, the undisputed state of the evidence material to this inquiry. As applied to the facts before us, the inquiry is whether, in the light of the attending circumstances, the persons in charge of the train, who negligently carried Nelson in his sick condition by La Crosse, ought to have anticipated that this might cause him some injury. The facts of his affliction, which need not be here restated, were brought to the attention of the trainmen and

they were requested to put him off at La Crosse, and informed that he desired to get home for care and treatment. It seems obvious that, under such circumstances, an ordinarily prudent person would know that a sick person must necessarily be injured to some extent from the excitement incident to the worry, disappointment, and mental strain, and the additional physical exertion required for the extra travel, his stay among strangers at the hotel, and the delay in receiving proper rest, care, and medical attention. That defendant negligently carried Nelson by La Crosse, that his condition was in fact worse thereafter, and that this was the natural and probable result of defendant's negligence, are facts found by the jury, thus leaving only the fact of reasonable anticipation of injury under the circumstances necessary to establish liability. As we have shown, the court should have held as matter of law that this fact was established, and hence any error in submitting it to the jury cannot avail defendant. That the duty of reasonable anticipation of injury from negligent acts may be so apparent from the facts that it is to be inferred as matter of law has been held in various cases. A reference to *Allen v. Voje,* 114 Wis. 1, 89 N. W. 924, will suffice. There the subject was considered and discussed and cases collected on this subject.

We must hold that the evidence fully supports the verdict and the judgment and that no prejudicial error is shown in the record.

By the Court.—Judgment affirmed.

STATE EX REL. SKOGSTAD, Appellant, vs. ANDERSON, Interpleaded, and others, Respondents.

November 14—December 4, 1906.

Certiorari: *When issued: Discretion: Parties: Highways: Review of award of damages: Adequate remedy.*

1. The writ of *certiorari* is not a writ of right, but is issued only in the discretion of the court as an extraordinary process when other and ordinary remedies are inadequate.
2. A writ of *certiorari* cannot issue save on the relation of a party to the record sought to be reviewed, either in name or in substance, in the sense that the decision sought to be reviewed would involve special, immediate, and direct injury to his interests.
3. A taxpayer as an individual, on behalf of himself and other taxpayers similarly situated, sued out a writ of *certiorari* to review and annul the decision of an appellate jury appointed by the county judge to review an award of damages to A., resulting from the opening of a highway through his premises upon an application signed by relator and others, A. being the appellant. *Held:*

(1) The decision of the jury merely created an ostensible and *prima facie* claim against the town: legal if the decision was valid, no claim in fact or law if the appellate proceedings were void.

(2) The town being a legal person capable of making its own defenses, the effect of the decision of the jury on the plaintiff was neither special, immediate, nor direct. It was not special, for it fell upon him only in common with the great body of taxpayers. It was not direct or immediate, for it fell upon the town and reached the relator only through the general process of taxation.

(3) While taxpayers might in a proper case invoke the aid of the court to prevent the depletion of the common treasury or prevent an illegal charge thereon, the primary duty and right to resist such injury rested on the town itself acting by its constituted authorities, and the relator could not be heard to champion the rights of the town without showing that the officers refused to do so either by words or acts.

(4) Before the relator could suffer any injury from the award of the jury it must be presented either to the town board or to

the electors in town meeting, and no presumption exists that either body would allow or pay it if illegal.

(5) If the award were disallowed by the town board or town meeting the claimant, in order to enforce it, must sue upon the award, and in that suit all the grounds of invalidity suggested by the petition or writ would be available for consideration.

(6) The court rightly exercised its discretion in quashing the writ.

APPEAL from an order of the circuit court for Trempealeau county: J. J. FRUIT, Circuit Judge. *Affirmed.*

Appeal from order quashing writ of *certiorari* sued out by the relator as an individual taxpayer on behalf of himself and other taxpayers similarly situated to review and annul the decision of an appellate jury appointed by the county judge of Trempealeau county to review the award of damages to one *Anders Anderson* resulting from the opening of a highway through his premises upon an application signed by *Skogstad* and other residents, *Anderson* being appellant—the alleged grounds of invalidity in the proceedings of said jury being that the county judge excused one of the struck jurymen after the precept was issued and before the time fixed for them to meet, without notice to the supervisors of the town or to any of the interested parties; that the sheriff summoned a talesman without knowledge or consent of and without notice to the supervisors or any of the interested parties; that such talesman was on the original list of fifteen names, and was stricken off by one of the parties and therefore unqualified; that the county judge did not appear at the time and place fixed in the precept for the meeting of the jury; and that the jury was not sworn by the county judge. The writ being addressed both to the town clerk and to the county judge, the former made return of the entire record in his office, and the county judge made return that none of the record remained with him, but all had been transmitted to and filed with the town clerk, but added a narrative of the proceedings, from which appears the fact of the excusing of

one of the jurymen before the return day of the precept, the direction to the sheriff to summon a talesman, of which no notice was given either to the supervisors of the town or to the relator, and that the sheriff did summon one Frederickson, whose name was stricken from the original jury list; also that the county judge did not appear at all at the meeting of the jury, who therefore were not sworn by him. On his application, *Anderson,* the landowner, was joined as a party defendant by way of interpleader. He first moved to strike out all of the return of the county judge and certain narrative matter in the return of the town clerk not appearing of record and not responsive to the writ, and further moved to quash the writ for the reason that it does not state facts sufficient to constitute a cause of action, and that it appears by the petition that the relator is not a proper party to the action, also that he has adequate remedy at law, and that he has been guilty of laches; whereupon the court entered an order reciting that it appeared that the petition does not show a proper case for the allowance of the writ, and that upon the equities of the case the same should not be permitted to lie, and was improvidently issued, ordering that the writ be quashed and *Anderson* recover costs from the relator, *Skogstad,* from which order *Skogstad* brings this appeal.

For the appellant the cause was submitted on the brief of *S. G. Gilman,* and for the respondents on that of *R. S. Cowie.*

Dodge, J. The writ of *certiorari* is not a writ of right, but is issued only in the discretion of the court as an extraordinary process when other and ordinary remedies are inadequate. Harris, Certiorari, § 43; *Knapp v. Heller,* 32 Wis. 467; *State ex rel. Schintgen v. La Crosse,* 101 Wis. 208, 77 N. W. 167; *State ex rel. Meggett v. O'Neill,* 104 Wis. 227, 80 N. W. 447; *State ex rel. Hallauer v. Gosnell,* 116 Wis. 606, 619, 93 N. W. 542. It cannot issue save upon the relation of a party to the record sought to be re-

viewed, either in name, or in substance in the sense that the decision sought to be reviewed would involve special, immediate, and direct injury to his interests. 6 Cyc. 766 *et seq.; People ex rel. Lawrence v. Schell,* 5 Lans. 352; *State ex rel. Milwaukee Medical College v. Chittenden,* 127 Wis. 468, 107 N. W. 500; *State ex rel. Sullivan v. Drake, ante,* p. 152, 109 N. W. 982. Applying these principles to the present situation, the effect of the decision of the jury awarding damages to *Anderson* is merely to create an ostensible and *prima facie* claim against the town of Chimney Rock: a legal claim if the decision of the jury is valid, no claim at all in fact or law if the appellate proceedings are void, as relator claims. It in no wise affects the relator save as one of the taxpayers of that town. Hence it is obvious that the only direct effect of the decision or its enforcement would be to subject the town to a liability. The town is a legal person, capable of making its own defenses, and the effect on the plaintiff is neither special, immediate, nor direct. It is not special, for it falls upon him only in common with the great body of taxpayers. It is not direct or immediate, because it first falls upon the town and reaches him only through the general process of taxation, whereby some portion of the town's expenses is distributed amongst the property owners. *Kircher v. Pederson,* 117 Wis. 68, 74, 93 N. W. 813. Another consideration tending strongly to justify the discretion exercised by the trial court in quashing this writ is that, while taxpayers, as also stockholders in private corporations, may in a proper case invoke the aid of a court to prevent depletion of the common treasury or to prevent an illegal charge thereon, the primary duty and right to resist such injury rests in the corporation itself acting by its constituted authorities, and no member thereof will be heard to champion the rights of such corporation without showing that the officers refuse to do so either by words or acts. *Cunningham v. Wechselberg,* 105 Wis. 359, 361, 81

N. W. 414; *State ex rel. Hallauer v. Gosnell,* 116 Wis. 606, 93 N. W. 542; *State v. Browning,* 27 N. J. Law, 527, 529; 6 Cyc. 768, 769. Before the relator can suffer any injury from this award it must be presented either to the town board or to the electors in town meeting, and there is surely no presumption that either body will allow or pay it if illegal. Again, it being disallowed, the respondent *Anderson* must sue upon it, and in such suit all the grounds of invalidity suggested by either the petition or the writ now before us will have ample opportunity for consideration. For these reasons, without searching for others, we think the trial court rightly exercised its discretion in quashing the writ.

By the Court.—Order appealed from is affirmed.

FARLEY, Respondent, vs. BRIEBACH and others, Appellants.

November 14—December 4, 1906.

Assault and battery: Justification.

1. In an action for assault and battery it appeared, among other things, that plaintiff entered the shop of defendants, and publicly and peaceably obtained possession of a union card under claim of right, and while leaving the shop was attacked by defendants, assaulted, and beaten severely in efforts to regain possession of the card by force. There was no evidence that plaintiff was resisted in any way in his obtaining peaceable possession of the card. *Held,* that the assault and battery were unjustifiable.
2. In such case whether defendants had forfeited their right to the card or not did not alter the situation. It was sufficient that the union claimed the right to remove it, and that plaintiff went into the shop to get possession of the card, and did get possession of it peaceably.

APPEAL from a judgment of the circuit court for La Crosse county: J. J. FRUIT, Circuit Judge. *Affirmed.*

This action was brought to recover damages for assault and battery. At the time of the alleged assault and battery plaintiff was a butcher workman employed in the city of La Crosse, Wisconsin. He was a member and officer of an organization commonly known as the Butchers' Union. The defendants were at the time of the assault and battery proprietors of another meat market in said city, and had in their shop a union or market card furnished by the Butchers' Union. On the day of the assault plaintiff was sent to the defendants' shop to get the card. He entered the shop and asked one of the defendants for the card, and some discussion arose as to the right to remove it, whereupon plaintiff took the card from the wall and walked toward the door. The defendants attacked him and forcibly took the card from him, and in so doing struck and beat him. Thereafter this action was commenced by plaintiff for assault and battery. The answer was a general denial. The action was tried by the court and a jury, and judgment rendered in favor of plaintiff and against the defendants, from which this appeal was taken.

C. L. Hood, for the appellants.

For the respondent there was a brief by *Higbee & Higbee,* and oral argument by *J. E. Higbee.*

KERWIN, J. But two questions need be considered upon this appeal: (1) Did the plaintiff get peaceable possession of the card? and (2) Did the defendants by force take it from the possession of plaintiff, and in so doing commit an assault and battery? Counsel for defendants frankly says in his brief: "If this court thinks the evidence shows no justification, then the verdict should stand." We think it very clear that the evidence shows no justification. The plaintiff entered the shop of defendants, and publicly and peaceably got possession of the card under claim of right. He was an officer of the union and was ordered to take the card, for what rea-

son is not material. There is evidence that, prior to the time plaintiff took the card, the secretary of the union notified the defendants to deliver the card, that they had forfeited the right to have it in their shop. Whether the defendants had forfeited their right to the card or not does not alter the situation. It is sufficient that the union claimed the right to remove it, and that plaintiff went to the shop to get possession of it, and did get possession of it peaceably. There is no evidence that plaintiff was resisted in any way in his attempt to get peaceable possession of the card. After he got peaceable possession and was leaving the shop the evidence shows that he was attacked by the defendants, assaulted, and beaten in their efforts to take the card from his possession by force. The evidence shows that he was quite severely beaten, that one of his teeth was knocked out, his lip split, and his eye blackened. One of defendants testified: "I reached for the card, he tried to keep it, and I tried to take it, and I saw I could not get the card, and I hit him. He didn't let go of it, and I hit him again." These undisputed facts leave no room for doubt that the assault and battery was wholly unjustifiable. *Monson v. Lewis,* 123 Wis. 583, 101 N. W. 1094; *Winter v. Beebe,* 126 Wis. 379, 105 N. W. 953.

By the Court.—The judgment of the court below is affirmed.

VAUNDRY, Administrator, Appellant, vs. CHICAGO & NORTHWESTERN RAILWAY COMPANY, Respondent.

November 14—December 4, 1906.

Railroads: Negligence: Injuries to employees: Sectionmen: Assumption of risk: Contributory negligence: Operation of trains: Signals and warnings.

1. Under the evidence, stated in the opinion, a railroad sectionman, sent to place a flag to warn trains to slow down as they approached the place where other sectionmen were working, is *held*

to have assumed the risk of his own safety from an extra train running over the tracks without notice or warning except such as resulted incidentally from the ordinary noises of the train, including such bell and whistle signals as were customary.

2. Where a railroad sectionman, in the discharge of his duty, was killed while moving toward an approaching train of which there was an unobstructed view for 600 or 800 feet ahead of him, the deceased was *held* guilty of contributory negligence precluding recovery, even if there was negligence on the part of the railroad company.

3. In the absence of statutory regulation, employees of a railroad company are not required to signal by whistle or otherwise merely because the train is rounding a curve.

APPEAL from a judgment of the circuit court for La Crosse county: J. J. FRUIT, Circuit Judge. *Affirmed.*

This is an action to recover damages by reason of injuries caused by the alleged negligence of the defendant October 8, 1904, which resulted in the death of the plaintiff's intestate, then in the employ of the defendant. Issue being joined and trial had, the court at the close of the plaintiff's testimony granted a nonsuit, and from the judgment entered thereon the plaintiff appeals. The evidence tends to prove that the deceased would have been twenty years of age November 11, 1904; that he lived with his father at North La Crosse, near the Burlington shops; that his father had for many years been employed as a switch-light tender for the Burlington Railway Company and lived about four blocks from the railroad tracks; that the deceased commenced helping his father in such work when he was about ten years of age, and after that continued to help him in such work until he entered the employ of the defendant as a sectionman in 1899, since which time he had worked for the defendant as a member of a section crew, working under the direction or control of a section foreman or boss. While his father was working on the railroad and for ten or eleven years he used a railroad velocipede or bicycle, and the deceased was accustomed to ride on it with his father and used it some alone. On the morning in question the section foreman told the crew of which the

deceased was a member to go to work about three fourths of a mile east of Medary, and told the deceased to take the velocipede and go and stick up a slow-flag half a mile further east of the place where the men were to be at work, and then to return and work with the men until after dinner, and then, if he (the foreman) did not return after dinner, to patrol the track. The men were to raise the track, loosen the rails, raise it up, and surface the same. The purpose of putting up a slow-flag was to caution all trains going west to run slowly where the men were at work. The foreman had gotten the velocipede a day or two before for that purpose, and cautioned the deceased to be careful in using it. Velocipedes were in constant use on railroad tracks. Sometimes, in patroling the track, the deceased had walked; sometimes he had taken more men and a handcar. Such directions were given at the toolhouse at Medary, 400 or 500 feet from the tower, about 7 o'clock of that morning. The tower is for the purpose of handling the interlocking plant. There was an extra train from the east that morning, but the foreman did not know the fact when he sent the deceased to put up the slow-flag; but he knew that there were extra trains on the road very often. Regular trains run on schedule time; extra trains under orders from the train dispatcher. The slow-flag was so ordered for no particular train, but for any train that might come. Such extra trains are quite frequent at times—sometimes three or four a day, then none; but extra trains were of common occurrence. When out working on the road there was no way for the men to know whether extra trains were coming. Slow-flags are put out for extra trains as well as regular trains, or whether any are known to be coming or not. They are put on the right-hand side of the approaching train, and mean for trainmen to have their trains under control. When trains are coming, men working along the track must get out of the way. Such men cannot keep in communication with the tower man to find out whether trains are coming. They are liable to come at any

time. In going up to put out the slow-flag the deceased went in the direction of the mud cut that morning. That cut was between 500 and 600 feet long and curves two degrees, and the curve continues for a considerable distance beyond the cut. Standing at one end of the cut a person could easily see a railroad train as it entered the other end of the cut. The accident occurred in the cut, and about half way between the middle and the east end. The deceased could have seen the approaching train 600 or 800 feet ahead of him from the place where he was struck. There were no printed regulations as to the duties of sectionmen while at work, except that they must govern themselves according to all trains. They have to protect themselves. About half past 6 o'clock on the morning in question the telegraph operator in the tower got a report from Sparta, seven miles distant, that an extra train was approaching from the east, and he could have told the section foreman, had he inquired, but he did not. He was in the habit of telling any one who asked him. The sectionmen heard one long whistle, and then, after the train came on a ways, they saw the handcar—velocipede—going under the engine, breaking.

William S. Burroughs, for the appellant.

Edward M. Hyzer, for the respondent.

CASSODAY, C. J. Upon the evidence, of which a general summary is given in the foregoing statement, the trial court granted a nonsuit. On the part of the plaintiff it is claimed that the evidence tends to prove that the injury was caused by the negligence of the section foreman, who was at the time a co-employee with the deceased within the meaning of the statute. Sec. 1816, Stats. 1898, as amended by ch. 448, Laws of 1903. Such negligence is said to consist in his failure to ascertain from the telegraph operator in the tower that a train was expected to arrive from the east and then to inform the deceased of the fact before sending him to put up the slow-flag. But the only reason for sending the deceased

to put up the slow-flag was because some train was then expected from the east. It might be quite near or it might be quite distant. After putting up the slow-flag the deceased was to return and work with the crew during the forenoon, and, if the foreman did not return, then he was to patrol the track during the afternoon. According to the evidence the slow-flag was to inform the men operating the train, so as to keep the same under control. As stated by the trial court, it is not the practice and it is not expected that the section foreman will be with his crew during all the time they are at work. When so at work they necessarily assume the risk of their own safety. This court has recently held that "sectionmen upon railroads assume the risk of trains of all sorts, 'regular' or 'wild,' running over the tracks at all times and at such rates of speed as are attainable, without notice or warning except such as results incidentally from the ordinary noises of the train, including such bell and whistle signals as are customary." *Ives v. Wis. Cent. R. Co.* 128 Wis. 357, 107 N. W. 452. The testimony on the part of the plaintiff brings the case squarely within the rule thus stated. The statute cited precludes recovery where the injured party is guilty of contributory negligence. The deceased was necessarily going toward the approaching train at the time. According to the testimony there was nothing to obstruct his view of the train for 600 or 800 feet ahead of him. So, as held by the trial court, if there was negligence on the part of the defendant, still the deceased "was equally guilty of contributory negligence on his part." So we concur with the trial court in holding that there is no statute requiring the employees of a railway company to signal by whistle merely because the train is rounding a curve. Besides, it appears that the whistle was blown some time before the accident. We fail to find any reversible error.

By the Court.—The judgment of the circuit court is affirmed.

LIPSCOMB, Plaintiff in error, vs. THE STATE, Defendant in error.

November 14—December 4, 1906.

Criminal law: Robbery: Assault with intent to rob: Evidence: Information: Sufficiency: Statutes: Pleading: Variance: Instructions to jury: Dangerous weapons.

1. In a criminal prosecution for an assault with intent to rob, the evidence, stated in the opinion, is *held* to sustain a verdict of guilty.
2. The elements of the crime at which sec. 4375, Stats. 1898, is directed are: (1) assault; (2) actual robbery; (3) being armed with a dangerous weapon; and (4) intent, if resisted, to kill or maim, or, in lieu of this intent, actual wounding or striking. Hence an information charging that the defendant feloniously assaulted the complaining witness and put him in fear and actually robbed him, specifying an amount, the defendant being armed with a dangerous weapon, to wit, a revolver, wholly omits the fourth element and does not charge the crime defined by that section.
3. Such information does, however, charge the crime defined by sec. 4376, Stats. 1898 (providing that any person being armed with a dangerous weapon who shall assault another with intent to rob or murder shall be punished).
4. Although such information charged actual robbery instead of intent and was followed by a verdict of guilty, there is no prejudicial variance between the statute, the information, and the verdict, since, while the information charged more than the statute required, it in legal effect charged also all that the statute and verdict covered.
5. In a criminal prosecution for assault with intent to rob being armed with a dangerous weapon, the court stated in its charge that no one had given any testimony upon the question whether the defendant was armed at a specified time and place. *Held*, that testimony of the defendant that he had no revolver on the night in question did not render such statement erroneous, since the jury must have understood the charge as referring to absence of specific testimony, and not that defendant's testimony was untrue or not to be considered.
6. An empty revolver merely pointed at a person, and not used to strike with, is not a dangerous weapon, however much the person at whom it is pointed may be put in fear.
7. A loaded revolver pointed at a person within shooting distance is a dangerous weapon as a matter of law.

8. In a criminal prosecution when the state proves that a gun or revolver was pointed at a person within shooting distance with a threat or other words indicating intention to fire, the person assailed not knowing but that it is loaded, the state has made *prima facie* proof that the gun or revolver was loaded and consequently a dangerous weapon.
9. Such facts, if proven beyond a reasonable doubt, conclusively establish an assault, are *prima facie* proof that the assault was committed with a dangerous weapon, and it then devolves upon the defendant to show that the weapon was not loaded in order to meet the presumption that it was loaded.
10. In a criminal prosecution for an assault with intent to rob being armed with a dangerous weapon, there was no direct proof that the revolver was loaded, and instructions to the jury, stated in the opinion, are *held* erroneous in omitting any proper instruction as to what constituted a dangerous weapon, and in stating that if the revolver, as used, was the means by which the complaining witness was compelled to submit to the robbery, it was thereby shown to be a dangerous weapon.
11. In such criminal prosecution it was error to refuse a requested instruction: "You are instructed that if you can reconcile the evidence before you upon any reasonable hypothesis consistent with the defendant's innocence, you should do so, and in that case acquit the defendant," such instruction not having been covered by the general charge.

ERROR to review a judgment of the municipal court of Milwaukee county: A. C. BRAZEE, Judge. *Reversed.*

For the plaintiff in error there was a brief by *W. E. & F. P. Burke,* and oral argument by *W. E. Burke.*

For the defendant in error there was a brief by the *Attorney General* and *J. E. Messerschmidt,* state law examiner, and oral argument by *Mr. Messerschmidt.*

WINSLOW, J. The plaintiff in error (hereafter called the defendant) was convicted in the municipal court of Milwaukee county of assault upon one Fred Seifert with intent to rob, being armed with a dangerous weapon, and was sentenced to imprisonment in the state prison therefor, and prosecutes this writ of error to reverse the judgment.

The defendant's first contention is that the verdict is con-

trary to the evidence. It is undisputed that the defendant and the complaining witness Seifert were together from about 7 o'clock in the evening of December 20, 1905, until nearly morning, going from saloon to saloon in the city of Milwaukee and drinking; that when they first met defendant had only $1.40 and Seifert had a check for $15; that after drinking at Adam Smith's saloon they went to a small tailor shop where defendant bought a suit of clothes for $2.75 and put them on; that Seifert got his check cashed and loaned defendant $1.35, to pay the balance for the clothes, and that they spent the rest of the night at various saloons, winding up at the saloon of one Ward in the early morning hours, at which place defendant had a five-dollar bill and paid for the drinks. Seifert testified that when they were near the corner of Thirty-third street and Sycamore the defendant drew a pistol and leveled it at him, threatening to shoot, and demanded his money, and went through his pockets and took all the money in them, and afterwards threatened to kill him if he told any one, and compelled him to go with the defendant a considerable distance in the direction of the Ward saloon, and, when under a viaduct, searched the clothes of the complaining witness for money, but found none. The defendant admits substantially the wanderings of the night, but denies that he robbed Seifert or that he had any pistol, and alleges that Seifert gave him the $5 to treat with. There was some evidence tending to show that defendant left the city for several days after the occurrence, for the purpose of avoiding the officers, and it also appeared that the defendant was previously convicted of larceny. While the foregoing is a very condensed statement of the material evidence, it is not considered that it would be profitable to enter into further details. It must be sufficient to say that after careful perusal we are unable to say that the verdict is not sustained by the evidence.

It is next contended that the verdict found the defendant

guilty of a crime not charged in the information. The information charged in brief that the defendant feloniously assaulted Seifert and put him in fear and actually robbed him of $13, he (the defendant) being armed with a dangerous weapon, to wit, a loaded revolver. It is argued that the information charged a crime under sec. 4375, Stats. 1898, which provides as follows:

"Any person who shall assault another and shall feloniously rob, steal or take from his person any money or other property which may be the subject of larceny, such robber being armed with a dangerous weapon, with intent, if resisted, to kill or maim the person robbed, or being so armed, who shall wound or strike the person robbed, shall be punished by imprisonment in the state prison not more than ten years nor less than three years."

It will be seen that the crime at which this section is directed contains four distinct elements, viz.: (1) Assault; (2) actual robbery; (3) being armed with a dangerous weapon; and (4) intent if resisted to kill or maim, or, in lieu of this intent, actual wounding or striking. The fourth element is wholly lacking in the present information, and hence it cannot be held to charge the crime defined by this section. It does, however, charge the crime defined by sec. 4376, Stats. 1898, and of which the defendant was convicted. This section is as follows:

"Any person being armed with a dangerous weapon who shall assault another with intent to rob or murder shall be punished by imprisonment in the state prison not more than fifteen years nor less than one year."

It is true that the present information charged actual robbery instead of intent, but, as actual robbery always includes intent, there is no prejudicial variance between the statute, the information, and the verdict. The information charged more than the statute required, but in legal effect it charged also all that the statute or the verdict covered.

The trial judge in the course of his charge said to the jury

that no one gave any testimony upon the question whether the defendant was armed when he was at the tailor shop. This is complained of as an error because the defendant testified that he had no gun that night at all. This evidence, however, was a mere general statement covering the whole evening. As a matter of fact no one did give any specific testimony as to the presence or absence of a weapon at the tailor shop, and we entertain no doubt but that the jury must have understood the charge as referring to this lack of specific testimony, and did not understand it to charge that the defendant's general statement was untrue or was not to be considered.

The serious difficulty in the case, however, arises upon the charge of the court upon the question of what constitutes a dangerous weapon. It is an essential element of the crime of which the defendant was convicted that he be armed with a dangerous weapon. An empty revolver merely pointed at a person, and not used to strike with, is not a dangerous weapon, however much the person at whom it is pointed may be put in fear. A loaded revolver pointed at a person within shooting distance is a dangerous weapon as matter of law. This does not mean that it was necessary in the present case for the state to introduce proof that some person loaded the revolver or saw the cartridges in it. Under the weight of authority, when the state proves that a gun or revolver was pointed at a person within shooting distance with a threat or other words indicating intention to fire, the person assailed not knowing but that it is loaded, the state has made *prima facie* proof that the gun or revolver is loaded and consequently a dangerous weapon. *State v. Herron,* 12 Mont. 230, 29 Pac. 819; *State v. Cherry,* 11 Ired. Law, 475; *State v. Shepard,* 10 Iowa, 126; *Beach v. Hancock,* 27 N. H. 223; *Crow v. State,* 41 Tex. 468.

These facts if proven beyond reasonable doubt conclusively establish an assault, and are *prima facie* proof that the as-

sault was committed with a dangerous weapon. If such pointing be admitted by the defendant it devolves upon him to show that the weapon was not loaded in order to meet the presumption that the revolver was loaded. See authorities cited above. The case of *Nevada v. Napper,* 6 Nev. 113, holding to the contrary, seems to stand practically alone and is disapproved. In the present case there was no direct proof that the revolver was loaded, but this was an essential element of the crime of which the defendant was convicted, hence the jury should have been carefully told what facts would justify them in finding that the revolver as used was a dangerous weapon; *i. e.* that it was loaded. The only instructions given which refer at all to this question were the following:

"If you find from the evidence in this case beyond a reasonable doubt that at the time and place charged, the defendant made an assault upon Seifert with a revolver, that he then and there had a revolver in his hand which he aimed and pointed at Seifert, and that Seifert then and there believed it to be loaded—I think the testimony does not show whether or not it was,—and further find that this revolver which Seifert believed to be loaded was the means of putting him in fear and overcoming and compelling him to deliver up his money, then you may consider the question as to whether the revolver as used was or was not a dangerous weapon. . . . In order to find the defendant guilty under this section [4378] you have not got to find that Seifert committed any falsehood in this case at all. Mr. Seifert has not testified, as I understand it, in this case that that revolver was loaded; the simple question is for you to determine under the first question, whether the revolver as used, if it was used, was the means and force by which he was compelled to submit to the robbery, and therefore a dangerous weapon."

Careful reading of these instructions shows that not only was no proper instruction given on the question, but that a positively erroneous instruction was given, namely, that if the revolver, as used, was the means by which Seifert was

compelled to submit to the robbery it was thereby shown to be a dangerous weapon. This instruction was properly excepted to, and, as it was positively erroneous, a reversal of the judgment must follow.

The defendant asked that the following instruction be given, but it was refused:

"You are instructed that if you can reconcile the evidence before you upon any reasonable hypothesis consistent with defendant's innocence, you should do so, and in that case acquit the defendant."

This is a correct and familiar principle and was not covered by the general charge, and should have been given.

By the Court.—Judgment reversed, and action remanded for a new trial. The warden of the state prison at Waupun will surrender the defendant's person to the custody of the sheriff of Milwaukee county to be by him held to abide the further order or judgment of the court.

TOPOLEWSKI, Plaintiff in error, vs. THE STATE, Defendant in error.

November 14—December 4, 1906.

Criminal law: Trial: Reception of evidence: Hearsay: Appeal and error: Harmless error: Larceny: Elements of offense: Trap set for offender.

1. Subject to recognized exceptions hearsay evidence is not allowable, and its admission is presumed to be prejudicial unless the contrary clearly appears.
2. On the trial of a person for a particular offense, evidence tending to prove that he has committed other distinct offenses is incompetent and generally prejudicial. The evidence should be confined to the particular offense charged.
3. In a criminal prosecution tried by the court without a jury the admission of improper evidence is to be regarded on appeal as

having been harmless, unless it clearly appears that otherwise the finding would probably have been different.

4. In a prosecution for larceny the prosecutor, a packing company, procured D., its employee, to arrange with defendant for the latter to consummate, as he supposed, larceny of the prosecutor's goods. Defendant in the course of the negotiations so sanctioned by the prosecutor suggested to D. the plan to be followed, which was agreed upon between the two, each to be an actor in the matter. Subsequently the plan was sanctioned by the prosecutor, the purpose on the part of the prosecutor being to entrap and bring defendant to justice. The prosecutor carried out the part of such plan necessary to its consummation assigned to it in the agreement between defendant and D., defendant not knowing that the prosecutor was advised of the impending offense, and at the finality caused one of its employees, tacitly at least, to consent to the taking of the goods, such employee not knowing the real nature of the transaction. *Held:*

(1) The conduct of the prosecutor took from the transaction the element of trespass or nonconsent essential to the crime.

(2) When D. agreed to procure the prosecutor to do the acts necessary for defendant to consummate his part of the plan, the prosecutor in legal effect agreed thereto.

(3) The acts of the prosecutor constituted consent to the appropriation of the goods by defendant.

5. Where the owner of property, by himself or his agent, actually or constructively, aids in the commission of the offense, as intended by the wrongdoer, by performing or rendering unnecessary some act in the transaction essential to the offense, the would-be criminal is not guilty of all the elements of the offense.

ERROR to review a judgment of the municipal court of Milwaukee county: A. C. BRAZEE, Judge. *Reversed.*

The accused was charged with having stolen three barrels of meat, the property of the Plankinton Packing Company, of the value of $55.20, and was found guilty. The cause was appealed to and tried in the municipal court of Milwaukee county on evidence taken in the lower court, a jury being waived. The accused was again convicted and sentenced as before to pay a fine of $100 and $42.84, costs of prosecution, and to be committed to the house of correction of Milwau-

kee county until such payment should be made. There was a motion to set aside the conviction and for a new trial and also a motion in arrest of judgment. Both motions were denied. The fine and costs were paid under protest, to avoid the consequences as to imprisonment.

The evidence was to this effect: The Plankinton Packing Company suspected the accused of having by criminal means possessed himself of some of its property and of having a purpose to make further efforts to that end. A short time before the 14th day of October, 1905, one Mat Dolan, who was indebted to the accused in the sum of upwards of $100, was discharged from the company's employ. Shortly theretofore the accused pressed Dolan for payment of the aforesaid indebtedness and, the latter being unable to respond, the former conceived the idea of solving the difficulty by obtaining some of the company's meat products through Dolan's aid and by criminal means, Dolan to participate in the benefits of the transaction by having the value of the property credited upon his indebtedness. A plan was accordingly laid by the two to that end, which Dolan disclosed to the company. Such plan was abandoned. Thereafter various methods were discussed of carrying out the idea of the accused, Dolan participating with the knowledge and sanction of the company. Finally a meeting was arranged between Dolan and the accused to consider the subject, the packing company requesting the former to bring it about, and with knowledge of Dolan causing one of its employees to be in hiding where he could overhear whatever might be said, the arrangement being made on the part of the company by Mr. Layer, the person in charge of its wholesale department. At such interview the accused proposed that Dolan should procure some packages of the company's meat to be placed on their loading platform, as was customary in delivering meat to customers, and that he should drive to such platform, ostensibly as a customer, and remove such packages. Dolan agreed to the

proposition and it was decided that the same should be consummated early the next morning, all of which was reported to Mr. Layer. He thereupon caused four barrels of meat to be packed and put in the accustomed condition for delivery to customers and placed on the platform in readiness for the accused to take them. He set a watch over the property and notified the person in charge of the platform, who was ignorant of the reason for so placing the barrels, upon his inquiring what they were placed there for, to let them go; that they were for a man who would call for them. About the time appointed for the accused to appear he drove to the platform and commenced putting the barrels in his wagon. The platform boss supposing, as the fact was, that the accused was the man Mr. Layer said was to come for the property, assumed the attitude of consenting to the taking. He did not actually help load the barrels on to the wagon, but he was by, consented by his manner and, when the accused was ready to go, helped him arrange his wagon and inquired what was to be done with the fourth barrel. The accused replied that he wanted it marked and sent up to him with a bill. He told the platform boss that he ordered the stuff the night before through Dolan. He took full possession of the three barrels of meat with intent to deprive the owner permanently thereof and without compensating it therefor, wholly in ignorance, however, of the fact that Dolan had acted in the matter on behalf of such owner and that it had knowingly aided in carrying out the plan for obtaining the meat.

For the plaintiff in error there was a brief by *Blenski & Cordes,* attorneys, and *Lenicheck, Fairchild & Boesel,* of counsel, and oral argument by *E. T. Fairchild.* They contended, *inter alia,* that there is a difference between a case where the owner of goods sets a trap to catch a thief, merely leaving the goods exposed in order that they may be taken, and the case where the owner, by his agent or otherwise, solicits a person suspected of an intention to steal to come forward and commit

the criminal act. In the latter case the taking is with the consent of the owner, and therefore does not constitute larceny. 18 Am. & Eng. Ency. of Law (2d ed.) 472; *Love v. People,* 160 Ill. 501, 32 L. R. A. 139; *Connor v. People,* 18 Colo. 373, 25 L. R. A. 341, and note; *Comm. v. Hollister,* 157 Pa. St. 13, 25 L. R. A. 349; *State v. Adams,* 115 N. C. 775; *Saunders v. People,* 38 Mich. 218, 220; *People v. McCord,* 76 Mich. 200.

For the defendant in error there was a brief by the *Attorney General* and *A. C. Titus,* assistant attorney general, and oral argument by *Mr. Titus.* They contended, *inter alia,* that the act on the part of the prosecutor in setting out the goods upon the platform was only facilitating a plan the defendant had previously devised for getting hold of the property. Such act did not amount to a consent to the taking of the property of the prosecutor. *People v. Hanselman,* 76 Cal. 460; *Dodge v. Brittain,* Meigs, 84; *Varner v. State,* 72 Ga. 745; *Rex v. Egginton,* 2 Leach C. C. 913; *Reg. v. Williams,* 1 C. & K. 195; *Rex v. Norden,* 2 East P. C. 666; *King v. Whittingham,* 2 Leach C. C. 912; *Comm. v. Nott,* 135 Mass. 269; *State v. Jansen,* 22 Kan. 498; *Pigg v. State,* 43 Tex. 108; *Thompson v. State,* 18 Ind. 386; 1 Wharton, Crim. Law, sec. 917.

MARSHALL, J. Evidence was allowed of a hearsay character that the accused, prior to the occurrence in question, had been a party to criminally appropriating property of the packing company. Mr. Layer was permitted to testify that the accused at one time conspired with Peter Juston to so obtain some of its property and succeeded in that regard as said Juston informed the witness, and as was indicated by the books kept by Juston and papers manipulated by the latter. Juston was permitted to testify to such unlawful appropriation of property so far as the purpose of the accused had to do with the transaction. Mere hearsay evidence, subject to some

exceptions not important here, is never allowable and the admission of it is presumed to be prejudicial, unless the contrary clearly appears. Again, on the trial of a person for a particular offense evidence tending to prove that he has committed other distinct offenses is incompetent and generally prejudicial. *Albricht v. State,* 6 Wis. 74; *Fossdahl v. State,* 89 Wis. 482, 62 N. W. 185; *Boldt v. State,* 72 Wis. 7, 38 N. W. 177; *Paulson v. State,* 118 Wis. 89, 98, 94 N. W. 771; *Barton v. Bruley,* 119 Wis. 326, 96 N. W. 815; *Holmes v. State,* 124 Wis. 133, 102 N. W. 321.

When a person is charged with being guilty of a particular offense he has a right, which should not be trespassed upon at all, to have the evidence in support of such charge confined to that particular offense. That, of course, has nothing to do with the rule allowing evidence of a former conviction as bearing on the subject of credibility of the accused in case of his offering himself as a witness, nor the rule permitting proof of other offenses so intimately connected with the one charged as to be evidentiary of the intent essential. Cases of the latter character too often lead to the improper admission of evidence contrary to the general rule above stated.

Notwithstanding the foregoing the admission of the improper evidence does not give cause for a reversal here. In a case tried by the court the admission of improper evidence is to be regarded on appeal as having been harmless, unless it clearly appears that but therefor the finding would probably have been different. *Harrigan v. Gilchrist,* 121 Wis. 127, 314, 99 N. W. 909. We are unable to see any clear indication that the plaintiff in error was prejudiced by the error in this case. If the judgment is fatally tainted with error the fault lies in a misconception of the law as regards trespass being essential to the crime of larceny or as to, under what circumstances, in regard to the conduct of the owner of the subject of the larceny, such element does not exist.

It was frankly conceded on the oral argument by the

learned attorney general that if the plaintiff in error committed the crime of larceny Dolan, the decoy of the packing company, was a guilty participant in the matter, unless the element of guilt on his part was absent, because, while in the transaction he acted ostensibly as an accomplice of the accused, his acts were in fact those of the packing company. So in the circumstances characterizing the taking of the barrels of meat from the loading platform the case comes down to this: If a person procures another to arrange with a third person for the latter to consummate, as he supposes, larceny of the goods of such person and such third person in the course of negotiations so sanctioned by such person suggests the plan to be followed, which is agreed upon between the two, each to be an actor in the matter, and subsequently that is sanctioned secretly by such person, the purpose on the part of the latter being to entrap and bring to justice one thought to be disposed to commit the offense of larceny, and such person carries out a part of such plan necessary to its consummation assigned to such other in the agreement aforesaid, such third person not knowing that such person is advised of the impending offense, and at the finality causes one of its employees to, tacitly at least, consent to the taking of the goods, not knowing of the real nature of the transaction, is such third person guilty of the crime of larceny, or does the conduct of such person take from the transaction the element of trespass or nonconsent essential to such crime?

It will be noted that the plan for depriving the packing company of its property originated with the accused, but that it was wholly impracticable of accomplishment without the property being placed on the loading platform and the accused not being interfered with when he attempted to take it. When Dolan agreed to procure such placing the packing company in legal effect agreed thereto. Dolan did not expressly consent, nor did the agreement he had with the packing company authorize him to do so, to the misappropriation

of the property. Did the agreement in legal effect with the accused to place the property of the packing company on the loading platform, where it could be appropriated by the accused, if he was so disposed and was not interfered with in so doing, though his movements in that regard were known to the packing company, and his taking of the property, his efforts to that end being facilitated as suggested, constitute consent to such appropriation?

The case is very near the border line, if not across it, between consent and nonconsent to the taking of the property. In *Reg. v. Lawrance,* 4 Cox C. C. 438, it was held that if the property was delivered by a servant to the defendant by the master's direction the offense cannot be larceny, regardless of the purpose of the defendant. In this case the property was not only placed on the loading platform, as was usual in delivering such goods to customers, with knowledge that the accused would soon arrive, having a formed design to take it, but the packing company's employee in charge of the platform, Ernst Klotz, was instructed that the property was placed there for a man who would call for it. Klotz from such statement had every reason to infer, when the accused arrived and claimed the right to take the property, that he was the one referred to and that it was proper to make delivery to him and he acted accordingly. While he did not physically place the property, or assist in doing so, in the wagon, his standing by, witnessing such placing by the accused, and then assisting him in arranging the wagon, as the evidence shows he did, and taking the order, in the usual way, from the accused as to the disposition of the fourth barrel, and his conduct in respect thereto, amounted, practically, to a delivery of the three barrels to the accused.

In *Rex v. Egginton,* 2 B. & P. 508, we have a very instructive case on the subject under discussion here. A servant informed his master that he had been solicited to aid in robbing the latter's house. By the master's direction the

servant opened the house, gave the would-be thieves access thereto, and took them to the place where the intended subject of the larceny had been laid in order that they might take it. All this was done with a view to the apprehension of the guilty parties after the accomplishment of their purpose. The servant by direction of the master not only gave access to the house but afforded the would-be thieves every facility for taking the property, and yet the court held that the crime of larceny was complete, because there was no direction to the servant to deliver the property to the intruders or consent to their taking it. They were left free to commit the larceny, as they had purposed doing, and the way was made easy for them to do so, but they were neither induced to commit the crime, nor was any act essential to the offense done by any one but themselves.

In harmony with the case last discussed, in *Williams v. State,* 55 Ga. 391, cited by counsel for the plaintiff in error, it was held that the owner of property may make everything ready and easy for a larceny thereof by one purposing to steal the same, and then remain passive, allowing the would-be criminal to perpetrate the offense of larceny as to every essential part of such offense, without sacrificing the element of trespass or nonconsent; but if one ostensibly acting as an accomplice, but really for the owner of the property, for the purpose of entrapping the would-be criminal, does acts amounting to the constituents of the crime of larceny, although the accused concurred in and supposed he prompted the act, he is not guilty of larceny. The circumstances of that case were these: The would-be criminal when he took the property supposed he was committing the offense of larceny and that his associate was criminally participating therein, but because, as a fact, such person was acting by direction of the owner, and actually placed the property in the hands of the taker, the element of nonconsent essential to larceny did not characterize the transaction. A distinc-

tion was drawn between one person inducing another to commit the crime of larceny of the former's goods or such person aiding in the commission of the offense, so far as the mental attitude of such other is concerned, by doing some act essential to such an offense, and merely setting a trap to catch a would-be criminal by affording him the freest opportunity to commit the offense. The latter does not sacrifice the element of nonconsent. *State v. Jansen,* 22 Kan. 498; *Varner v. State,* 72 Ga. 745; *State v. Duncan,* 8 Rob. (La.) 562; *Reg. v. Williams,* 1 C. & K. 195; *Rex v. Egginton,* 2 B. & P. 508.

In the case before us the owner of the property through its agent, Dolan, did not suggest the plan for committing the offense of larceny, which was finally adopted, but the evidence shows, conclusively, that by the consent or direction of the packing company, through words or otherwise, he suggested the commission of such offense and invited from the accused plans to that end. The fair construction of the evidence is that in the finality the plan was a joint creation of the two and that it required each to be an active participant in its consummation. It seems that there is good reason for holding that the situation in that respect falls within the condemnatory language in the opinion of the court in *Love v. People,* 160 Ill. 501, 43 N. E. 710, cited to our attention by counsel for the plaintiff in error. That will be apparent from the closing words of the opinion, which are as follows:

"A contemplated crime may never be developed into a consummated act. To stimulate unlawful intentions for the purpose and with the motive of bringing them to maturity so the consequent crime may be punished, is a dangerous practice. It is safer law and sounder morals to hold, where one arranges to have a crime committed against his property or himself, and knows that an attempt is to be made to encourage others to commit the act by one acting in concert with such owner, that no crime is thus committed. The owner and his agent may wait passively for the would-be criminal to perpe-

trate the offense, and each and every part of it, for himself, but they must not aid, encourage, or solicit him that they may seek to punish."

We cannot well escape the conclusion that this case falls under the condemnation of the rule that where the owner of property by himself or his agent, actually or constructively, aids in the commission of the offense, as intended by the wrongdoer, by performing or rendering unnecessary some act in the transaction essential to the offense, the would-be criminal is not guilty of all the elements of the offense. Here Mr. Layer, acting for the owner of the property, packed or superintended the packing of the four barrels of meat as suggested by the owner's agent in the matter, Dolan, and caused the same to be placed on the platform, knowing that the accused would soon arrive to take them, under an arrangement between him and its agent, and directed its platform boss, when he inquired as to the purpose of so placing the barrels, "Let them go; they are for some man and he will call for them." He, from the standpoint of such employee, directed the latter to deliver the barrels to the man when he called, the same in all respects as done in *Williams v. State,* 55 Ga. 391. He substantially made such delivery, by treating the accused when he arrived upon the scene as having a right to take the property. In that the design to trap a criminal went a little too far, at least, in that it included the doing of an act, in effect preventing the taking of the property from being characterized by an element of trespass.

The logical basis for the doctrine above discussed is that there can be no larceny without a trespass. So if one procures his property to be taken by another intending to commit larceny, or delivers his property to such other, the latter purposing to commit such crime, the element of trespass is wanting and the crime not fully consummated however plain may be the guilty purpose of the one possessing himself of such property. That does not militate against a person's being free to set a trap to catch one whom he suspects of an in-

tention to commit the crime of larceny, but the setting of such trap must not go further than to afford the would-be thief the amplest opportunity to carry out his purpose, formed without such inducement on the part of the owner of the property, as to put him in the position of having consented to the taking. If I induce one to come and take my property and then place it before him to be taken, and he takes it with criminal intent, or if knowing that one intends to take my property I deliver it to him and he takes it with such intent, the essential element of trespass involving nonconsent requisite to a completed offense of larceny does not characterize the transaction, regardless of the fact that the moral turpitude involved is no less than it would be if such essential were present. Some writers in treating this subject give so much attention to condemning the deception practiced to facilitate and encourage the commission of a crime by one supposed to have such a purpose in view, that the condemnation is liable to be viewed as if the deception were sufficient to excuse the would-be criminal, or to preclude his being prosecuted; that there is a question of good morals involved as to both parties to the transaction, and that the wrongful participation of the owner of the property renders him and the public incapable of being heard to charge the person he has entrapped with the offense of larceny. That is wrong. It is the removal from the completed transaction, which from the mental attitude of the would-be criminal may have all the ingredients of larceny, from the standpoint of the owner of the property, of the element of trespass or nonconsent. When such element does not characterize a transaction involving the full offense of larceny so far as concerns the mental purpose of such would-be criminal is concerned, is often not free from difficulty and courts of review should incline quite strongly to support the decision of the trial judge in respect to the matter and not disturb it except in a clear case. It seems that there is such a case before us.

If the accused had merely disclosed to Dolan, his ostensible

accomplice, a purpose to improve the opportunity when one should present itself to steal barrels of meat from the packing company's loading platform, and that had been communicated by Dolan to the company and it had merely furnished the accused the opportunity he was looking for to carry out such purpose, and he had improved it, the situation would be quite different. The mere fact that the plan for obtaining the property was that of the accused, under the circumstances of this case, is not controlling. Dolan, as an emissary of the packing company, as we have seen, was sent to the accused to arrange, if the latter were so disposed, some sort of a plan for taking some of the company's property with the intention of stealing it. Though the accused proposed the plan Dolan agreed to it, which involved a promise to assist in carrying it out, ostensibly as an accomplice, but actually as an instrument of the packing company. That came very near, if it did not involve, solicitation by the company, in a secret way, for the accused to take its property as proposed. With the other element added of placing such property on the loading platform for the accused to take pursuant to the agreement, with directions, in effect, to the person in charge of the platform, to let the accused take it when he came for that purpose, we are unable to see any element of trespass in the taking which followed. The packing company went very significantly further than the owner of the property did in *Rex v. Egginton,* 2 B. & P. 508, which is regarded as quite an extreme case. It solicited the opportunity to be an ostensible accomplice in committing the offense of larceny instead of being solicited in that regard, and the property was in practical effect delivered to the would-be thief instead of its being merely placed where he could readily trespass upon the rights of the packing company by taking it. When one keeps in mind the plain distinction between merely furnishing opportunity for the execution of a formed design to commit larceny and negotiations for the purpose of developing

a scheme to commit the offense, regardless of who finally proposes the plan jointly adopted, and not facilitating the execution of the plan by placing the property pursuant to the arrangement where it can readily be taken, but in practical effect, at least, delivering the same into the possession of the would-be thief, one can readily see that the element of trespass, involving consent, is present in the first situation mentioned and not in the last, and that the latter pretty clearly fits the circumstances of this case.

By the Court.—The judgment is reversed, and the cause remanded for a new trial.

CASES DETERMINED

AT THE

January Term, 1907.

CLOSUIT and others, Respondents, vs. JOHN ARPIN LUMBER COMPANY, Appellant.

December 4, 1906—January 8, 1907.

Appeal and error: Findings: Conclusiveness: Practice: Ejectment: Adverse possession: Limitation of actions: Privity of possession: Tacking: Presumptions: Burden of proof.

1. Findings of the trial court merely affirming the issues joined by a general denial of the allegations of the complaint, without declaring specifically upon the affirmative defenses presented by the answer, except that all the material allegations of the answer are unproven and untrue, do not conclude the appellate court in the presence of evidence so in conflict as to present but a mere preponderance either way.
2. In such case the appellate court will choose between three courses of action: Affirm the judgment if clearly supported by a preponderance of the evidence; reverse if not so supported, ordering judgment in accordance with what appears to be the preponderance of the evidence; or, if that course seems to present peril of injustice, remand for further trial and findings.
3. In an action of ejectment it appeared, among other things, that there was more than twenty years' inclosure and physical occupation for a pasture by the defendant and a series of grantors in conveyances describing a tract of land not including that in dispute, but lying immediately south of and inclosed and occupied with it, and that from each such grantor to his grantee there was delivered the actual physical possession without interval, break, or interruption. *Held*, that thereby was created privity of possession justifying the tacking of each possession to its predecessor.

4. In such case the occupancy presented all the characteristics usual in occupation by the owner of such land, and while presumptively it was in subordination to the true legal title, yet when it was shown that the occupancy had continued for twenty years, a contrary presumption arose to the effect that at all times the acts of occupancy had been adverse to the true title and founded upon some claim of exclusive title in the occupant.
5. In such case the burden is thereby cast upon those disputing the adverseness of the possession to overcome such presumption by affirmative proof.
6. In an action of ejectment one defense was twenty years' adverse possession. The court made no specific finding thereon, but found generally that the allegations of the answer were unproven. On review of the evidence, stated in the opinion, it was *held* that it was insufficient to establish a surrender or interruption of the adverse possession established by defendant, and, there being nothing to indicate that other or different evidence could be produced, judgment was ordered confirming defendant's title.

APPEAL from a judgment of the circuit court for Wood county: CHAS. M. WEBB, Circuit Judge. *Reversed.*

Action in ejectment to recover premises described in the complaint as lot 5 of subdivision of fractional lot 7 of section 8, township 22 north and range 6 east, according to Sargent's plat of the city of Grand Rapids, containing about two and one-half acres. Defense was general denial and pleas of the ten and twenty years' statutes of limitation, based upon alleged possession by the defendant and its predecessors in title up to the time of commencing suit. It appeared that there were two government lots in section 8, namely, lot 8 and lot 7, the north line of lot 8 and the south line of lot 7 being the one-eighth section line. Defendant and its predecessors in title hold a chain of conveyances to the north part of lot 8. The premises described in the complaint are in the south part of lot 7. Defendant's predecessors in title had occupied the lands covered by their conveyances as a pasture, inclosed by a fence, which fence also inclosed the premises now in dispute ever since some time prior to 1875. A somewhat incomplete chain of title from the government to

the south part of lot 7, including the land now in dispute, with more, reached Hopkins, Landauer & Friend in 1878, who, however, are not shown to have attempted any actual possession. In May, 1882, these parties received a tax deed from Wood county covering the land in dispute with other lands, which was duly recorded on the same date. Through mesne conveyances the title of Hopkins, Landauer & Friend reached Welcome Hyde, who, on May 11, 1885, conveyed to F. J. M. Closuit a tract of land in the southern part of government lot 7, including with other lands that now claimed. At that time John Arpin held conveyance of the north part of lot 8, and was in possession, using the same as a pasture, the fence around such pasture inclosing the land now in dispute, as hereinbefore stated. There was testimony that in 1885 John Arpin and F. J. M. Closuit had a meeting at which Closuit claimed that the north fence of the pasture was upon his land, and Arpin conceded such to be the fact, and promised that later they would ascertain where the true line was and change the fence thereto. The fence thereafter was repaired from time to time in its old location and never was changed. F. J. M. Closuit is dead, and the plaintiffs are his heirs at law. John Arpin is also dead, and his executors made conveyance to the defendant according to his previous conveyance, describing merely the north part of lot 8, whereupon the defendant went into possession and used as a pasture all that was inclosed within the fence, including the land now in dispute. The court made no findings upon any of the specific issues of fact, but made a general finding to the effect that the plaintiffs are the owners and entitled to the possession of the premises and that the defendant unlawfully withholds the same, and has since January, 1900, and that the allegations of the complaint are true and of the answer unproven, but by opinion filed it is indicated that the court reached the conclusion that the possession of defendant and its predecessors in title of this land outside the

calls of their conveyances, and to which they had no pretense of paper title, was not adverse to the true owner. Accordingly judgment was rendered in favor of the plaintiffs and against the defendant for possession and for $25 damages, from which the defendant appeals.

For the appellant there were briefs by *Goggins & Brazeau,* and oral argument by *T. W. Brazeau.*

W. E. Wheelan, for the respondents.

DODGE, J. The conclusion reached by the court upon certain of the issues of fact raised by the pleadings is so conclusive of the action as to render unnecessary of consideration several of the other questions, whether of fact or law.

The answer alleges that the defendant and its grantors have been in continuous, open possession under claim of title exclusive of any other right, and now own the premises by virtue of sec. 4213, Stats. 1898; also that the action was not commenced within the time limited by sec. 4207, Stats. 1898. By this last allegation is presented the issue of fact whether plaintiffs or their predecessors in title have been seised or possessed of the land at any time within twenty years from the commencement of the action. There is no finding by the trial court on either of these issues. The findings merely affirm the issues joined by the general denial of the allegations of the complaint without declaring specifically upon the affirmative defenses presented by the answer. On such issues nothing is found, except that all the material allegations of the answer are unproven and untrue. This does not rise to the dignity of a finding such as concludes this court on appeal in presence of evidence so in conflict as to present but a mere preponderance either way. *Milwaukee Nat. Bank v. Gallun,* 116 Wis. 74, 92 N. W. 567; *Burke v. Sidra Bay Co.* 116 Wis. 137, 141, 92 N. W. 568; *Farmer v. St. Croix P. Co.* 117 Wis. 76, 93 N. W. 830; *Chippewa B. Co. v. Durand,* 122 Wis. 85, 92, 99 N. W. 603; *McKenzie v. Haines,* 123 Wis.

557, 563, 102 N. W. 33. It but leaves the court in the predicament described in *Brown v. Griswold,* 109 Wis. 275, 280, 85 N. W. 363, with a choice between three courses of action, viz.: to affirm the judgment if clearly supported by preponderance of the evidence; to reverse if not so supported, ordering judgment in accordance with what appears to this court to be the preponderance; or, if that course seems to present peril of injustice, to remand for further trial and findings.

We have examined the evidence carefully and discover no substantial conflict in the testimony of witnesses to specific facts or circumstances, though the inferences to be drawn therefrom may present room for difference of opinion. There is no question of the more than twenty years' inclosure and physical occupation for a pasture by defendant and a series of grantors in conveyances describing a tract of land not including that in dispute, but lying immediately south of and inclosed and occupied with it. Neither is there any doubt that from each such grantor to his grantee was delivered the actual physical possession without interval, break, or interruption; thus creating privity of possessions and justifying the tacking of each to its predecessor. *Wollman v. Ruehle,* 104 Wis. 603, 80 N. W. 919; *Illinois S. Co. v. Budzisz,* 106 Wis. 499, 82 N. W. 534; *Clithero v. Fenner,* 122 Wis. 356, 99 N. W. 1027. Such occupancy has presented all the characteristics usual in occupation by the owner of such land, such as pasturing cattle upon it, renting it to others for like purposes, and erecting, maintaining, and rebuilding fences marking the limits of the possession so enjoyed. True, such acts are presumed to have been in subordination to the true legal title until they have continued for twenty years (sec. 4210, Stats. 1898); but when they have continued for that period a contrary presumption arises to the effect that at all times they have been adverse to the true title and founded upon some claim of exclusive title in the occupant. The burden thereupon is cast upon any one disputing the adverseness of the

possession to overcome such presumption by affirmative proof. *Meyer v. Hope,* 101 Wis. 123, 77 N. W. 720; *Wollman v. Ruehle, supra.* That is claimed to have been done in this case by the testimony of one of the plaintiffs that in 1885, when he was fifteen years old, he heard a conversation between his father, the now deceased F. J. M. Closuit, and John Arpin, who then occupied the disputed premises. Closuit, standing near the easterly end of the fence bounding Arpin's occupancy on the north, said: "John, this fence is on my land." Arpin answered he knew it, but when they got time to have it surveyed they would place the fence on the line. The conversation was, at most, casual, and not part of any negotiations or transaction. It is ambiguous as to whether it referred to some particular spot or portion of the fence. It by no means clearly indicates that Closuit was asserting or Arpin conceding the former's right to the two acres or more occupied by Arpin and not included by his deed. It is, at best, open to such uncertainty as to exact terms, resulting from the twenty years' lapse of time and the youth of the listener. Against its efficacy to break the otherwise apparently adverse occupancy is the fact that the parties to the conversation co-operated in repairing the fence some two years later, and for the ensuing several years of their lives maintained it as the boundary between their respective possessions. These considerations have led the court to the conclusion that the evidence does not establish either a surrender or interruption of John Arpin's possession, nor any seisin or possession by the plaintiffs' ancestor, within the twenty years before commencing this action, which, therefore, must be held barred by sec. 4207, Stats. 1898, irrespective of other defenses. There is nothing to indicate that other or different evidence would be produced if opportunity were given, nor other reason to deter us from ordering the judgment necessarily resulting from the views expressed.

By the Court.—Judgment reversed, and cause remanded with directions to enter judgment for defendant.

BREED, Administrator, and others, Appellants, vs. WEED and another, Respondents.

December 4, 1906—January 8, 1907.

Appeals from county courts: Bonds: Liability of surety for costs in supreme court.

The surety on an undertaking given under sec. 4032, Stats. 1898 (requiring the undertaking on appeal from the county to the circuit court to be conditioned that the appellant shall diligently prosecute his appeal to effect and pay all damages and costs awarded against him on such appeal), is not liable for the costs awarded on an appeal from the circuit to the supreme court, the words "on such appeal" restricting the liability to costs and damages awarded in the circuit court.

APPEAL from orders of the circuit court for Waupaca county: CHAS. M. WEBB, Circuit Judge. *Affirmed.*

Mary Weed, at that time *Mary Breed,* presented a claim in county court against the estate of Catherine M. Breed. This claim was disallowed, and, in the manner provided by statute for appeals from the county to the circuit court, she perfected an appeal to the circuit court. *Mary Breed,* as principal, and *C. H. Truesdell,* as surety, gave an appeal bond providing, in the words of the statute, that *Mary Breed* would diligently prosecute her appeal to effect and pay all damages and costs which should be awarded against her on such appeal. Upon appeal she was successful and obtained judgment in her favor in the circuit court. The contestants of the claim, the plaintiffs in the present action, appealed to the supreme court, where the judgment of the circuit court was reversed and the cause remanded with directions that the judgment of the county court disallowing the entire claim be affirmed. The costs taxed in the supreme court amounted to $138.75, and the costs in the circuit court were $35.05. Execution against *Mary Breed* issued in the supreme court to collect the costs and was returned wholly unsatisfied. Re-

spondents tendered payment of the circuit court costs, but have not paid the supreme court costs. *C. H. Truesdell* refused to pay the supreme court costs, but deposited $35.05 with the clerk of the circuit court to cover the costs in circuit court. This action is brought against *Mary Breed,* now *Mary Weed,* and *C. H. Truesdell,* as surety on the bond on appeal from the county to the circuit court, to recover the supreme court and the circuit court costs, with interest. Defendants' demurrers to the complaint were sustained. This is an appeal from the orders of the circuit court sustaining the demurrers.

For the appellants the cause was submitted on the brief of *Eberlein & Eberlein,* and for the respondents on that of *E. L. & E. E. Browne.*

SIEBECKER, J. The court held that the surety on the bond given on appeal from the county to the circuit court was not liable on such bond for the costs incurred on the appeal to the supreme court, upon the ground that the terms of the statute (sec. 4032, Stats. 1898) under which it was given restrict liability on the obligation to costs and damages awarded in the circuit court. The statute provides that the undertaking on appeal to the circuit court shall be to the effect that the appellant "will diligently prosecute his appeal to effect and pay all damages and costs which may be awarded against him on such appeal."

That the appeal was diligently prosecuted is not questioned, but it is averred that the terms of the statute and undertaking make the obligors liable for costs incurred on the appeal to this court from the judgment of the circuit court. Do the terms of the statute impose such a liability, or is liability upon such an undertaking limited to indemnity for costs and damages awarded against the party in the circuit court? The phraseology of the section is free from ambiguity, and there is no uncertainty as to the object sought to be accomplished.

It is evident that the legislature intended to secure to respondent the payment of the costs and damages which might be awarded him "on such appeal." The words "on such appeal" plainly suggest that the surety's undertaking is to be restricted to the payment of costs and damages which may be awarded him in the circuit court. The context clearly indicates that it refers to the appeal provided for in the preceding section, namely, the one from the county to the circuit court, and excludes the idea of any liability for the costs incurred by a subsequent removal of the cause to this court. Another appeal bond is required on removal of the cause from the circuit court to this court. This is strongly corroborative that it was intended to limit and restrict the liability on this kind of an undertaking to the costs and damages awarded against the appellant in the circuit court.

The case of *Smith v. Lockwood,* 34 Wis. 72, cited to our attention as in principle sustaining appellants' claim, does not in fact sustain such a contention. That was a case against a party as surety for plaintiff in a justice's court action to enforce payment of the costs recovered by the defendant against the plaintiff on a trial *de novo* on appeal to the circuit court. In that case the undertaking was given under a statute which provided that the obligor became "security for costs in this cause." It was held that the costs against plaintiff upon the trial of the appeal to the circuit court were costs in the case within the language and terms of the statute, because the proceedings in the circuit court were a continuation of the same case within the terms of the security given in the justice's court. Such is not the situation here presented under the statute. This statute was so framed as to restrict the obligation of the surety to the payment of the costs and damages awarded against his principal in the circuit court on appeal from the county court. The circuit court ruled correctly in sustaining the demurrers to the complaint.

By the Court.—The orders appealed from are affirmed.

JACKSON MILLING COMPANY, Respondent, vs. SCOTT, Defendant: MALICK, Petitioner, Appellant.

December 4, 1906—January 8, 1907.

Quieting title, by whom maintained: Practice: Address of petition: Prayer: Judgments: Inequitable enforcement: Parties: Independent action.

1. One who has sold and warranted the title to realty may maintain judicial proceedings to remove a cloud on such title or to prevent a cloud thereon.
2. The addressing of a petition filed in a cause to the circuit judge instead of the court is at most a harmless irregularity that cannot mislead any one, where the showing in the petition was expressly to the court and the matter was treated as an application thereto.
3. In such case a prayer for a judgment, where strictly an order is the appropriate relief, is a harmless irregularity.
4. One not a party to an action in which a judgment has been rendered, who is interested in opposing the enforcement thereof, where such enforcement as to him would be unjust because the judgment has been paid or never had been a lien on or claim against any property of his, and where the judgment may be enforced, nevertheless, to his prejudice, as an existing indebtedness, is so situated that he may apply by petition for relief in that action. He cannot bring an independent action in equity for such relief.
5. In such case the application for relief cannot be dismissed because the applicant is not a party to the action. The proceeding is proper whether the applicant be a party to the action or a stranger.
6. In such case the expression "stranger" refers to one not a party to the action but interested, nevertheless, in preventing the enforcement of the judgment, either at all, or in the way threatened or attempted.

APPEAL from orders of the circuit court for Portage county: CHAS. M. WEBB, Circuit Judge. *Reversed.*

J.P.Malick petitioned the circuit court for Portage county, in an action that had proceeded to judgment in such court entitled as follows, to wit: *Jackson Milling Company,* plaintiff, v. A. Scott, defendant, setting forth in substance as fol-

lows: May 25, 1897, plaintiff obtained judgment in the county court of Portage county for $360.47 and costs against defendant A. Scott. May 26, 1897, such judgment was duly transcripted to the circuit court for such county. May 28, 1897, it was likewise transcripted to the circuit court for Wood county. April 7, 1898, the petitioner became the owner of the N. W. ¼ of the N. W. ¼, and the S. ½ of the N. W. ¼ of section 1, town 25, range 5 east, in said Wood county, by a deed from A. M. Scott and the defendant, her husband, the deed being duly recorded thereafter in the office of the register of deeds of said county. The petitioner by warranty deed with full covenants, dated April 18, 1898, and thereafter duly recorded, conveyed the land to J. O. Foxen. July 27, 1895, George Hopper, the then owner of said land, conveyed the same to A. Scott by name, but the grantee in fact was the A. M. Scott before mentioned. April 20, 1898, the petitioner gave to the defendant his check for $700, the proceeds thereof to be used in paying said judgment and another, the aggregate of which was less than the amount of such check. On the same day the defendant drew the money on the check and paid to the plaintiff, its attorneys or agents the full amount due on the first-mentioned judgment, the plaintiff, its attorneys or agents agreeing to satisfy the same of record in Wood county and in Portage county. Such satisfaction has not been entered. The judgment has not only been fully paid, but it was never a lien on said land. Nevertheless plaintiff caused an execution to be issued thereon March 10, 1906, and placed in the hands of the sheriff of Wood county for collection, and he threatens to levy on and sell said land, and the petitioner fears that he will do so unless restrained therefrom by the court, and that such levy and sale, should the same occur, would damage the petitioner by reason of his covenants of warranty. The petitioner's grantee has demanded of the former that he save the latter harmless from such judgment and execution. The

petitioner fears that unless the plaintiff and the sheriff are restrained by the court from selling said land, he, the petitioner, will be damaged and the title to said lands will be clouded. The judgment is an apparent but not an actual lien on said land.

The petition was verified and thereon a temporary injunction was obtained from a court commissioner restraining the enforcement of the judgment against the land mentioned till the further order of the court. Such temporary injunction was prayed for in the petition, and a judgment was also prayed for setting aside the execution, declaring the land free from any lien of the judgment, declaring such judgment satisfied, and giving other relief. A bond was given by the petitioner to protect the plaintiff against loss in case the petitioner should not finally be found to be entitled to the relief prayed for. The petition was entitled in the action. It was in form addressed to the Hon. CHARLES M. WEBB, judge of the circuit court for Portage county. The opening lines thereof, following such address, were as follows: "The petition of *J. P. Malick,* of the city of Stevens Point, county of Portage and state of Wisconsin, respectfully shows unto the court." It was filed in the office of the clerk of such court. On motion thereafter such court vacated the injunctional order, and on a further motion to dismiss the petition and to strike the same from the files, and affidavit being presented on behalf of the plaintiff that only the temporary injunctional order and undertaking had been served on the plaintiff, an order was entered granting the motion to dismiss. No particular grounds therefor are stated in the order. In the motion these grounds were stated: (1) The petition does not state facts sufficient to entitle the petitioner to the relief prayed for; (2) the court has no jurisdiction of the subject matter of the petition; (3) the petition is improperly addressed; (4) no notice of motion on the petition was served on the defendant; (5) the petition improperly prayed for a judgment instead of

an order; (6) the petitioner has an adequate remedy at law; (7) the petitioner was not a party to the action. The petitioner appealed from both of the orders.

For the appellant the cause was submitted on the brief of *Hanna & Sicklesteel,* and for the respondent on that of *Gerhard M. Dahl* and *George B. Nelson.*

MARSHALL, J. If the petition is in accordance with the facts the judgment in this action has been paid and ought to have been satisfied. It is apparently a lien on the lands mentioned, breaching the covenant in appellant's deed to Foxen, and while it is not a lien in fact, respondent will, if not prevented in some judicial proceedings, treat the apparent lien as an actual incumbrance, necessarily, it would seem, to some extent prejudicing appellant. So although he is not a party to the action he is affected by the judgment, in that he is interested in having the facts established as to whether it has been paid or not, and in preventing its enforcement, especially against the land in question. So long as it stands it will be a menace to the title which he has covenanted to be free from incumbrances. That gives him sufficient standing in respect to the judgment to entitle him to the use of some judicial remedy to obtain a satisfaction thereof, if it has been paid, and in any event to have it declared not enforceable against the land mentioned. If it has not been paid it cannot be doubted but that Foxen could maintain an action to remove the cloud on his title created thereby and to prevent such title from being further clouded by proceedings to enforce it. It would seem to follow, necessarily, that appellant is entitled to a remedy for the same relief, since he must successfully defend his covenant or pay the damages caused by a breach thereof. The fact that the damages recoverable at law against appellant can only be nominal till Foxen shall have been compelled to pay the judgment as a valid claim against the land does not change the situation. The latter is entitled

to a judicial remedy to clear his title from the cloud thereon and to prevent a further cloud. Appellant would be a proper party thereto. In the proceedings he would be entitled to litigate with respondent the questions presented by the petition. Therefore, he must be entitled, on his own initiative, to a remedy against respondent. That would seem so on principle, but we have ample authority sustaining the proposition that he who has sold and warranted the title to realty may maintain judicial proceedings to remove a cloud on such title or to prevent a cloud thereon. *Ely v. Wilcox,* 26 Wis. 91; *Pier v. Fond du Lac Co.* 53 Wis. 421, 10 N. W. 686; *Hartford v. Chipman,* 21 Conn. 488, 499; *In re Phillips,* 60 N. Y. 16; *Sutliff v. Smith,* 58 Kan. 559, 562, 50 Pac. 455; *Jackson v. Kittle,* 34 W. Va. 207, 12 S. E. 484; *Remer v. Mackay,* 35 Fed. 86.

It does not seem that the dismissal of the petition can be justified because it was not addressed to the court instead of to the judge thereof. It is considered that the mere addressing of it to the judge was a harmless irregularity that could not have misled any one, since the showing in the petition was expressly to the court and the matter was treated as an application thereto. Nor do we think that the prayer for a judgment instead of an order is of any moment.

The dismissal cannot be justified because the petitioner was not a party to the action. That is not an open question. It is ruled by *Platto v. Deuster,* 22 Wis. 482; *Endter v. Lennon,* 46 Wis. 299, 50 N. W. 194; *Orient Ins. Co. v. Sloan,* 70 Wis. 611, 36 N. W. 388; *Stein v. Benedict,* 83 Wis. 603, 53 N. W. 891, and other cases. In such cases it is expressly said that a proceeding of this sort, whether by a party to the action or a stranger, is proper. Of course the expression as to a stranger refers to one not a party to the action but interested, nevertheless, in preventing the enforcement of the judgment, either at all, or in the way threatened or attempted.

The all-important question on this appeal is this: In a case where a person, not a party to an action in which a judgment has been rendered, is interested in preventing the enforcement thereof, and such enforcement as to him would be unjust because of the judgment having been paid or its never having been a lien or claim against any property of his, and it will be enforced, nevertheless, to his prejudice, as an existing indebtedness, may he apply by petition for relief in the action or must he bring an independent action in equity for relief? That no court has jurisdiction of the subject except the one in which the judgment was rendered, was decided in the cases referred to, but how about the court in which the judgment was rendered? Is that court powerless, in the limited sense of the term "jurisdiction," to give the person entitled to relief the use of its equity power in an action commenced by him?

As an original proposition it would seem that the last question should be answered in the negative. There is nothing in the Code, either expressly or inferentially, to the contrary, as we understand it, while its spirit and purpose is that, where there is a wrong which the law recognizes, to be redressed or to be prevented, as to any person, he shall have a judicial remedy to that end by the procedure which the written law indicates. There was a logical reason for holding that one circuit court does not possess jurisdiction to restrain the enforcement of a judgment rendered in another circuit court, but where the latter is called upon to deal with a judgment, as in this case, it is difficult to assign any good reason why there is a want of jurisdiction to do so by an independent action under our Code system, or why the court, if the remedy by petition is proper, should not at least have the right, in its discretion, to require the party to commence an independent action where the matter to be determined is so complicated that, in the judgment of the court, the subject can thereby be dealt with in a more orderly way than on petition in the

old action. It is not unlikely that if we were permitted to deal with the matter unhampered by previous decisions we might hold that the court in which a judgment has been rendered may so deal therewith, and that there is no question of jurisdiction, even in its most limited sense, involved in whether the court should be approached by petition or by action, especially none which would prevent its being approached in the latter way.

Notwithstanding what has been said, the practice to the contrary has been settled by a long line of decisions commencing with *Platto v. Deuster,* 22 Wis. 482, decided in 1868, and by affirmance thereof over and over again down to *Stein v. Benedict,* 83 Wis. 603, 53 N. W. 891, decided in 1892, where it was so strongly entrenched as to leave no opportunity whatever for the court to change its position without reversing that which has been as firmly established as anything could well be by judicial decisions. The rule as regards one circuit court restraining the enforcement of a judgment in another circuit court, by the cases referred to, applies with equal force where one circuit court by action is invoked to restrain the enforcement of a judgment by an independent action in the same court.

In *Endter v. Lennon,* 46 Wis. 299, 50 N. W. 194, it was said:

"One court of equity will not enjoin the process of another. One suit in equity will not lie to enjoin process issuing in another. The objection is fatal, whether the second suit be brought in the same or in another court, by a party or by a stranger to the first suit. The proper course by either party or stranger to the first suit is to apply by petition for relief in that suit."

In *Orient Ins. Co. v. Sloan,* 70 Wis. 611, 36 N. W. 388, it was said that the rule of *Endter v. Lennon, supra,* and similar cases is the same regardless of whether the judgment sought to be restrained is at law or in equity; and in *Stein v.*

Benedict, supra, where the relief sought was very complicated, and the situation to be dealt with was one, ordinarily, peculiarly within the field of equity by an independent action, such an action was brought in the court where the judgment sought to be restrained was entered, and the question of whether that procedure was proper was raised by demurrer upon the ground of want of jurisdiction to entertain the action. It was argued by able counsel, the objection was sustained in the court below, and upon appeal the judgment after mature deliberation was affirmed. In deciding the case this court said:

"The proper course is to apply by petition for relief in the first suit. The power of the court in which the first judgment or decree has been rendered, to grant relief in cases like this, is undoubted. This has long since passed beyond the field of discussion, and must be regarded as settled beyond dispute. . . . The objection to the jurisdiction of the court was sufficient to defeat the action. . . . Without considering whether the objection to the jurisdiction of the court may not be raised on such demurrer [referring to a demurrer *ore tenus*], or the court may not of its own motion act on the objection when not raised by a formal demurrer, . . . it must be held that it was here properly presented, so that the court might act on it and dismiss the complaint, upon which it was plain no relief, according to the settled decisions of this court, ought to be granted."

It should be noted that the term "jurisdiction" in this class of cases is not used in its technical sense: that which would render what is done void, but in the modified sense discussed at length in *Harrigan v. Gilchrist,* 121 Wis. 127, 99 N. W. 909: in the sense that the practice is so firmly settled in respect to the subject, and the confusion that would result from departing from it would be so great and prejudicial, that the court ought not to act contrary thereto whether objection is made by counsel or not, though in case it should act the result would be a binding judicial determination till reversed on appeal or set aside in some proper direct proceedings.

So we cannot well come to any other conclusion than that appellant took the only course open to him. True, there is a contrary indication in *Coe v. Manseau,* 62 Wis. 81, 22 N. W. 155, but the restrictions there put on *Platto v. Deuster, supra,* and *Endter v. Lennon, supra,* were not warranted by the facts and were clearly overruled in the subsequent cases we have cited. Though it seems that a trial court ought, at least, to be free to take the course which the learned court did in this case, the rule, as we have seen, is so firmly settled to the contrary, that we must leave it to the legislature to change the practice, if it is to be done. It is better for the court to adhere to a wrong rule of procedure, from an original standpoint, long established, which leaves parties a full remedy, than to change it by overruling decisions made from time to time during more than a quarter of a century.

It does not seem that any question was left that need be discussed on this appeal. The orders appealed from must be reversed.

By the Court.—So ordered.

HADTKE, Respondent, vs. GRZYLL, Appellant.

December 4, 1906—January 8, 1907.

Animals running at large: Personal injuries: Verdict: Perversity: Excessive damages: Statutes: Injuries by animals: Evidence of similar facts: Negligence: Constitutional law: Police power.

1. In an action for personal injuries inflicted on plaintiff by defendant's bull after its escape from defendant's premises onto the adjoining premises of plaintiff, a verdict of $800 for plaintiff is *held* supported by the evidence, and is neither perverse nor excessive in amount.
2. In such case evidence that the bull had broken through the fence into plaintiff's premises on three previous occasions during the same summer is admissible as tending to show that the defendant "suffered" the bull to be at large.

3. Sec. 1482, Stats. 1898, as amended by ch. 14, Laws of 1903 (providing that certain male animals, including bulls over six months old, shall not run at large, and that if the owner or keeper shall, for any reason, suffer any such animal so to do he shall be liable to a forfeiture, and be liable in addition for all damages done by such animal while so at large, *although he escapes without the fault of such owner or keeper*), does not impose an absolute liability upon the owner of the animal.
4. Sec. 1482, Stats. 1898, as amended by ch. 14, Laws of 1903, differentiates between "the running at large" and "the escape." It is the escape alone which is inexcusable by showing diligence, not the running at large.
5. Sec. 1482, Stats. 1898, as amended by ch. 14, Laws of 1903, does not impose liabilities upon the owner of the animal which are so unreasonable and extreme as to be beyond the limits of police power.

APPEAL from a judgment of the circuit court for Waupaca county: CHAS. M. WEBB, Circuit Judge. *Affirmed.*

For the appellant the cause was submitted on the brief of *John C. Hart* and *Park & Carpenter.*

For the respondent there was a brief by *H. J. Severson,* attorney, and *McFarland & Murat,* of counsel, and oral argument by *C. D. McFarland.*

WINSLOW, J. This is an action for personal injuries. The plaintiff is a married woman living with her husband and family on a farm adjoining a pasture owned by defendant in which was kept a three-year-old dehorned bull. It is undisputed that the bull escaped through the fence onto the premises of the plaintiff's husband September 9, 1904, and remained there for several hours. The plaintiff claims that the bull knocked or bunted her down several times while it was so upon her premises, inflicting serious injuries, but this was denied by the defendant. The trial resulted in a verdict for the plaintiff, followed by judgment for $800 damages and costs, and the defendant appeals.

The appellant contends that the verdict is not only unsupported by the evidence, but is perverse, and that the damages

are excessive; but a careful examination of the evidence presented in the bill of exceptions satisfies us that neither of these contentions can be sustained.

There were no exceptions to the charge of the court and but one ruling upon evidence is assigned as error. The plaintiff was allowed to prove against objection and exception that the bull had broken through the fence into the plaintiff's premises on three previous occasions during the same summer. This proof was received upon the theory that it tended to prove that the defendant "suffered" the bull to be at large under the principle laid down in the case of *Decker v. McSorley,* 111 Wis. 91, 86 N. W. 554. The appellant claims, however, that the action was brought under sec. 1482, Stats. 1898, as amended by ch. 14, Laws of 1903, and that under that section (if valid) it is immaterial whether the defendant suffered the animal to run at large. This section provides that certain male animals, including bulls over six months old, shall not run at large, and then proceeds as follows:

"And if the owner or keeper shall, for any reason, suffer any such animal so to do he shall forfeit five dollars to the person taking it up, and be liable in addition for all damages done by such animal while so at large, *although he escapes without the fault of such owner or keeper.*"

A further clause provides that the construction of any fence such as is enumerated in sec. 1390, Stats. 1898, shall not relieve such owner or keeper from liability for damage done on the inclosed premises of an adjoining owner. That part of the section beginning with the words *"although he escapes"* was added by the amendment of 1903, and the claim is that the section as it now stands makes the owner absolutely liable for all damages done by the animal while at large whether the owner be at fault or not, and the further contention is then made that the act imposes unreasonable liability beyond the limits of the police power and hence is void.

We are unable to agree with the contention that the act as

amended imposes an absolute liability. Prior to the amendment of 1903 it certainly did not do so. It was held by this court in *Montgomery v. Breed,* 34 Wis. 649, that a substantially similar statute did not apply to a case where the escape was without the owner's fault or negligence *and* every reasonable effort was made to recapture the animal after its escape was discovered. The amendment is directed to the question of the negligent escape alone, and not to the question of the negligent suffering of the animal to remain at large after its escape is known. The act now imposes liability upon the owner who "suffers" his animal to run at large even though the original escape was without fault. Diligence to prevent escape is no longer a defense or an element of defense, but diligence to recapture the animal after its escape is discovered, or should be discovered in the exercise of ordinary care, remains a defense. The act is penal in its nature. At best it imposes heavy liabilities and burdens upon the keepers of animals absolutely necessary to be kept by some one. It should have no unreasonable or strained construction. Its language, when carefully read, does not compel a construction imposing absolute liability. It differentiates between "the running at large" and "the escape." It is the escape alone which is inexcusable by showing diligence, not the running at large. Under this view of the statute we cannot say that it imposes liabilities on the owner which are so unreasonable and extreme as to be beyond the limits of police power. This view also justifies the reception of the evidence objected to.

By the Court.—Judgment affirmed.

PHIPPS, Administratrix, Respondent, vs. WISCONSIN CENTRAL RAILWAY COMPANY, Appellant.

December 4, 1906—January 8, 1907.

Order made in proceedings to examine adverse party: Interlocutory orders: Appealable orders.

1. **The examination of a party under the provisions of sec. 4096, Stats. 1898, is both a special proceeding and a provisional remedy.**
2. **An order requiring the witness to produce books and papers, made in the course of an examination of a party under the provisions of sec. 4096, Stats. 1898, is merely an interlocutory order regulating the manner of procedure upon the examination, is in no sense a final order, and does not in any proper sense grant, refuse, continue, or modify such provisional remedy.**
3. **Such order is not appealable under the calls of sec. 3069, Stats. 1898.**

APPEAL from an order of the circuit court for Milwaukee county: WARREN D. TARRANT, Circuit Judge. *Dismissed.*

The respondent moved to dismiss the appeal.

For the motion there was a brief by *Timlin & Glicksman,* and oral argument by *W. L. Gold.*

W. D. Corrigan, for the appellant.

WINSLOW, J. This is an action to recover damages on account of the death of Chas. Phipps, deceased, plaintiff's husband, who was a locomotive engineer in defendant's employ, and is alleged to have been killed by reason of the negligent and insecure construction of the railroad bridge on defendant's road through which his engine was precipitated. The defendant's answer denied all negligence. After issue was joined the plaintiff gave notice of taking the depositions of Charles M. Morris, the secretary, and of Thomas H. Gill, the general attorney, of the defendant company, as adverse witnesses, under the provisions of sec. 4096, Stats. 1898, and its amendments. The attendance of the witnesses before the

commissioner was compelled by a subpœna, which also required the production on the hearing of the plans of the bridge in question, as well as all telegrams or orders sent by the company to the conductor of the train which met the accident, as well as all other writings, telegrams, or statements in possession of the company relating to the inspection of the bridge, the cause of the disaster, or the matters set forth in the complaint. The witnesses declined to produce the plans and statements so desired, notwithstanding they were directed so to do by the commissioner, and the proceedings were thereupon certified to the circuit court, and upon motion that court made an order commanding the witnesses to produce the plans of the bridge, the telegrams or orders sent to the conductor or train crew, and the names of defendant's employees who possessed any knowledge of the accident. From this order the defendant appealed, and the plaintiff now moves to dismiss the appeal.

Appealable orders are classified and defined by sec. 3069, Stats. 1898. Reference to that section demonstrates at once that if the order before us is appealable it must be because it is (1) a final order affecting a substantial right made in special proceedings, or (2) an order granting, refusing, continuing, or modifying a provisional remedy. It is settled that the examination of a party under the provisions of sec. 4096, *supra,* is both a special proceeding and a provisional remedy. An order made in the course of such an examination, requiring the witness to produce books and papers, is, however, merely an interlocutory order regulating the manner of procedure upon the examination, and in no sense a final order; nor does it in any proper sense grant, refuse, continue, or modify the provisional remedy. These propositions have been fully settled by the court in previous decisions, and cannot be considered as open to doubt. *Stuart v. Allen,* 45 Wis. 158; *Knowles v. Rogers,* 99 Wis. 231, 74 N. W. 813; *State ex rel. Carpenter v. Mathys,* 115 Wis. 31, 91 N. W. 114; *Ellinger*

v. Equitable L. Assur. Soc. 125 Wis. 643, 104 N. W. 811. That such an order is not a final order is also held by the supreme court of the United States in *Alexander v. U. S.* 201 U. S. 117, 26 Sup. Ct. 356.

By the Court.—Appeal dismissed.

FORSTER, WATERBURY COMPANY, Respondent, vs. F. MACKINNON MANUFACTURING COMPANY, Appellant.

December 5, 1906—January 8, 1907.

Sales: Defects: Waiver: Measure of damages: Evidence.

1. Where articles required by contract to be of a particular character are shipped to the executory vendee as the proper kind and received by the latter without notice being given to the vendor, within a reasonable time thereafter, that the articles will not be accepted as satisfying the contract, all defects discoverable by reasonable attention to the matter are waived.
2. Where the manufacturer and seller of iron castings was to deliver in instalments, and after two shipments the buyers made complaint of defects, and in order to remedy such defects the patterns were changed and improved, and thereafter shipments were regularly made during an interval of about six months without definite notice of defects until after all shipments were substantially completed, the court is warranted in holding as matter of law that such defects, as to the castings made after the patterns were improved, were waived.
3. In such case, under the evidence, stated in the opinion, the alleged defects are *held* not to be so serious as to render the castings not good and suitable within the calls of the contract under which they were furnished.
4. In an action for the contract price of iron castings of certain required strength, it is not necessary for defendant, in order to enable it to recover for the failure of unused castings to come up to the contract requirements, to prove the amount of defectives, or the diminished value of the castings by reason thereof, with the certainty of a demonstration. All that is required is that such matters be established with reasonable certainty.
5. In an action for the contract price of iron castings required to be of certain strength, defendant counterclaimed for loss occa-

sioned by the failure of unused castings to come up to the contract requirements. It appeared, among other things, that the castings used, or attempted to be used, were fairly representative of the character of those that remained, and that about twenty per cent. of the castings used had latent defects causing them to break under the pressure required in their use and were wholly useless except for scrap iron. *Held:*

(1) In the absence of any affirmative evidence to the contrary, it was inferable, with sufficient certainty to sustain a finding, that the same proportion of those not used were likewise defective.

(2) A legitimate basis was established for estimating damages as to the castings not used.

(3) Defendant was entitled to recover the amount per pound the evidence showed to be the difference in value between the castings furnished and those called for by the contract requirements.

APPEAL from a judgment of the circuit court for Wood county: CHAS. M. WEBB, Circuit Judge. *Reversed.*

Action to recover on a sale contract between plaintiff as seller and the defendant as purchaser, the terms of which were as follows:

"To.....The *F. MacKinnon Mfg. Co.:*

"Quantity....40 tons malleable castings.

Patterns to be furnished by buyer. Castings to be good and suitable quality for hub bands. Buyer to have the privilege of returning any imperfect castings.

"Price.....5¼c per pound in carload lots on cars, Centralia, Wisconsin.

"Terms.....Freight cash, to be paid by buyer, balance cash thirty days from invoice date.

"Settlement other than net cash at Chicago, or by Chicago or New York draft, must include exchange. Notes must be for net amount, including interest and collection charges. All settlements must be made within thirty days from invoice date, unless otherwise specified.

"Shipments to be Made—One car about Jan. 1st, 1900. Balance prior to July 1st, 1900.

"Via C., M. & St. P. Ry.

"Freight Rate.

"In case of accident or other cause, causing the stoppage or partial stoppage of the works of either the sellers or buyers, the deliveries herein contracted for may be suspended, or at the option of the party not in default may be canceled during the continuance of said interruption. Such suspension or cancellation shall not invalidate the remainder of the contract, but on the removal of the cause of the interruption the deliveries shall be continued at the specified rate, and if the overdue deliveries shall not have been canceled they shall be made then at the regular rate, commencing when the contract would otherwise have ended.

"FORSTER, WATERBURY & Co."

There was a preliminary memorandum in respect to the matter in the following words:

"Centralia, Wisconsin,
"November 20th, 1899.

"*Forster, Waterbury & Co.,*
"358 Dearborn St.,
"Chicago, Ill.

"Memo. of agreement between the *F. MacKinnon Mfg. Co.* and *Forster, Waterbury & Co.* That the *F. MacKinnon Mfg. Co.* do contract with *Forster, Waterbury & Co.* for forty tons of malleable castings, at 5¼c per pound, in car lots, f. o. b. Centralia. Terms thirty days. The malleables to be suitable for the purposes required, and to be tough enough to stand the hydraulic pressure required of them. All defective malleable to be returned.

"THE F. MACKINNON MFG. CO.,
"F. MacKinnon, Secy."

The final contract embodied the provisions before indicated. Soon after deliveries commenced the defendant complained that the malleables were defective, in that the dove-tailed slots in the rims of the castings were more or less filled up and the castings were so brittle that many of them broke under the necessary pressure applied to place them on the wooden centers of the hubs. The malleables were intended for use as part of the make-up of wagon hubs. Complaints as to the defective character of the malleables continued from

time to time as deliveries were made and the castings were tested, and finally before the contract was wholly filled defendant rescinded it and refused to take any more of the castings. Subsequently this action was commenced to recover an alleged balance due of $776.44. The issues tendered by the complaint sufficiently appear by the summary of the findings hereafter given.

The defendant answered, among other things, counterclaiming for $3,163.80 for damages on account of the castings not being according to contract. The allegations of the counterclaim were duly put in issue, and all issues were referred to a referee to hear, try, and determine with this result: (1) The contract between the parties was as indicated in the foregoing. (2) The meaning of the term "castings to be good and suitable quality for hub bands," as the parties understood it, was the same as the idea contained in the preliminary memorandum by the words "the malleables to be suitable for the purposes required, and to be tough enough to stand the hydraulic pressure required of them," and plaintiff knew the manner of placing the malleables on the wooden hubs and all requirements in that regard. (3) Plaintiff delivered to the defendant castings of the value at the contract price of $3,959.17, and did work on patterns and paid for freight chargeable to the defendant to the amount of $233.75, making a total of its charges of $4,192.93. (4) The plaintiff claimed $5.70, freight on defective castings returned, and $98.86 for 1,883 pounds of castings shipped August 6, 1900. The former is disallowed because the castings were returned under the contract; the latter was allowed because the defendant included it in its statement to the plaintiff showing the amount of its credits and remitted the balance thus shown to be due. (5) The true amount of plaintiff's credit is $4,187.23. (6) Defendant is entitled to credit for freight paid $177.76, for shortage and defective castings $116.97, one cent per pound as per settlement on account of

labor on the first shipment of castings to render them fit for use, making $49.59, and for cash paid from time to time $3,279.74, making a total of $3,624.06, and leaving a balance due plaintiff, exclusive of defendant's counterclaim, of $563.17. (7) The defendant's claim for damages on account of defective malleables not used is disallowed, because it is in a great part guesswork; not sufficiently proved and, in effect, an attempt to relieve defendant from the dead stock of castings left over after an unsuccessful experiment with a patented article. The claim as to costs of repairing and extra cost of putting in tie plates in castings used not included in the first shipment is disallowed, because no complaint was made in the correspondence between the parties after defendant's patterns were perfected, and because the witnesses testified that no more work was done on malleables furnished by plaintiff than on those made by other manufacturers. The claim for one-half cent per pound on castings used is not satisfactorily supported by evidence and appears to have been an after-consideration to help defendant out as to dead stock. (8) Defendant is entitled to credit for 5,312 pounds of defective castings, to the amount of $258.66, and a further credit, on account of 397 defective castings weighing 2,314 pounds, of $114.65, and a further credit of $156.80 for hubs destroyed by reason of the defective castings. (9) The total allowed on the counterclaim is $530.11, leaving a balance due the plaintiff of $33.06.

Upon a hearing before the court the findings of the referee were modified by allowing defendant an additional credit for shortage in castings and culls of $25.20, leaving the balance due plaintiff $7.86, and as so modified were confirmed and judgment was rendered accordingly.

No complaint was made by the plaintiff of the conclusions reached by the referee or the circuit court. Defendant duly preserved for review upon appeal the questions discussed in the opinion.

For the appellant there was a brief by *Goggins & Brazeau,* and oral argument by *B. R. Goggins.*

W. E. Wheelan, for the respondent.

MARSHALL, J. Appellant makes the following claims: (1) The court should not have allowed respondent the $98.86 for 1,883 pounds of castings shipped August 6, 1900. (2) There should have been allowed appellant an additional credit on its counterclaim of $255.38 for extra cost of putting in tie plates, occasioned by defective dove-tailed slots and brittleness of malleables. (3) An additional amount of $411.38 should have been allowed on the counterclaim for defective quality of the unused castings on account of their not being properly annealed and not manufactured so as to avoid the defects called cold-shuts. (4) An additional amount of $169.65 should have been allowed on the counterclaim on account of expense of working off defective stock at reduced prices. (5) A further sum of $156.80 should have been allowed on the counterclaim on account of hub cores that would be destroyed in using the balance of the castings.

At the outset it is suggested that some improper evidence was received from a witness produced by respondent, but as it is not claimed that such evidence affected the result and counsel fail to do more than merely make the suggestion that such evidence can be found in the record, we pass the subject without further notice.

As to the $98.86 claimed to have been erroneously allowed respondent, we cannot agree with appellant. It appears, as the referee found, that the item was included by appellant in a statement rendered in the usual way; not as a matter of compromise and settlement, so far as we can see. Moreover, the statement and a check accompanying it covering the balance therein admitted to be due was not thereafter treated as a settlement by either party.

The effect of the decision in the court below as to imper-

fections in the castings, as regards the dove-tailed slots, is that they were not sufficiently serious to render the castings not good and suitable for hub bands, within the meaning of the contract, and further, that seasonable complaint was not made in regard thereto as to castings shipped after defects in appellant's patterns were remedied. Reference to the correspondence between the parties fails to convince us that any such complaint was made after February 16, 1900, which accords with the court's findings. Counsel for appellant suggest that there was evidence of such complaints, made verbally, in April, July, and September. By far the greater part of the shipments were made after February 16th. There was no shipment after June 29th, except the small amount covered by the item of $98.96. Furthermore, we do not find that any definite verbal complaint as to this branch of the subject was made in April, 1900. On the whole it is considered that the evidence fairly bears out the finding. It tends to prove that the patterns furnished by respondent at first, were defective in respect to the feature designed to make perfect dove-tailed slots; that such defect was removed by respondent at the latter's request and expense; that no verbal complaint was thereafter made informing respondent that castings would not be accepted as satisfying the contract because of defective dove-tailed slots till a considerable length of time after substantially all the shipments were made, and that no such complaint was made thereafter by letter, though complaints were made as to the castings being too brittle. In the letter written June 13, 1900, in which appellant finally rescinded the contract because the malleables were unsatisfactory, no mention was made of defective dove-tailed slots. The complaint was confined to the castings being too brittle and weak.

The rule is familiar that when an article required by contract to be of particular character is shipped to the executory vendee as of the proper kind and is received by the latter without notice being given to the vendor within reasonable

time thereafter that the article will not be accepted as satisfying the contract, all defects discoverable by reasonable attention to the matter are waived. *Locke v. Williamson,* 40 Wis. 377; *Northern S. Co. v. Wangard,* 117 Wis. 624, 94 N. W. 785; *H. McCormick L. Co. v. Winans,* 126 Wis. 649, 105 N. W. 945; *Waupaca E. L. & R. Co. v. Milwaukee E. R. & L. Co.* 112 Wis. 469, 88 N. W. 308. The rule in that regard was stated in the last case cited, thus:

"If a person sells another property to be delivered, accompanying the sale with a warranty, and when delivery takes place there are defects in the property which are discoverable by a person of ordinary intelligence in the circumstances of the purchaser, by the exercise of ordinary care, and such other nevertheless accepts the property, neither objecting thereto then nor within a reasonable time thereafter, he thereby waives the defects so that he can neither rescind the same, counterclaim for damages when sued for the purchase price, nor sue for damages for breach of warranty after paying for the property."

Defects of the character under consideration would be visible upon the most casual inspection, and from the circumstance that such defects had been noticed from the start and the patterns were perfected after the first shipments to avoid the difficulty, appellant had good reason to pay attention to that particular matter as subsequent shipments arrived and to seasonably notify respondent if the castings made from the improved pattern were not satisfactory in that regard. Two shipments were made prior to February 10, 1900. On that day respondent was by letter notified that the dove-tailed slots were imperfect. The next shipment was made February 12, 1900; plainly of castings prepared before the letter of February 10th. Shipments were made thereafter, from time to time, up to August 6, 1900, all except the 1,883 pounds aforesaid being, as indicated, sent by June 29, 1900, and by far the greater part before June 1, 1900. Such being the case, in the absence of evidence of any definite notice having been given to respondent as to defective dove-tailed slots

after February 16, 1900, till a considerable length of time after the shipments were substantially completed, the court was warranted in holding as matter of law that such defects, as to the castings made after the patterns were improved, were waived. On that ground as well as on the ground that the dove-tailed slots were not so seriously defective as to render the castings not good and suitable for hub bands, within the meaning of the contract, the disallowance of this branch of the case should not be disturbed.

The remaining question to be considered is: Were the castings not used and not obviously defective upon inspection, amounting to about 42,412 pounds, shown to be worth less than such as were contracted for because of their not being strong enough to stand the strain required to place them on the wooden hub cores, with sufficient certainty to entitle appellant to an allowance on its counterclaim on that account? The decision in the court below is that the evidence in that respect is not sufficiently convincing to remove the truth of the matter beyond mere conjecture. The items of appellant's claim for damages involved in this question are (a) the contract price, being $411.38, of the same percentage of the unused castings, not defective on their face, as proved wholly worthless as to those that were attempted to be put to use, less the value for scrap iron; (b) the value of the small percentage of wooden hub cores required in using the balance of the castings as past experience shows would probably be destroyed, being $156.80; and (c) cost of working off the stock, estimated at $169.65, making a total of $737.83. These claims should be considered as one, since the proper measure of damages, in case of a recovery, is the difference between the actual value of the castings and the value if they had been according to the requirements of the contract. *Aultman & T. Co. v. Hetherington,* 42 Wis. 622; *J. I. Case P. Works v. Niles & S. Co.* 90 Wis. 590, 63 N. W. 1013; *Park v. Richardson & B. Co.* 91 Wis. 189, 64 N. W. 859.

The evidence is undisputed that the castings were neces-

sarily subjected to great pressure in placing them on the wooden hub cores, and that in order for them to withstand it proper annealing and absence of defects called cold-shuts were necessary. Failure to so anneal the castings would leave them brittle and liable to break under the pressure, and cold-shuts would cause them to part at the sides because of the imperfect uniting of the iron on the lines of contact of the molten metal as the streams thereof flowing into the several gates, or openings, in the mould came to the blending points.

The court having found, partly as matter of fact and partly by way of construction, that the contract as understood by both parties was made with reference to a sale and purchase of castings of sufficient strength to withstand the pressure required in placing them on the wooden hub cores, such pressure being for ordinary hubs about thirty tons, as shown by the evidence, and found as matter of fact in appellant's favor on its defense and counterclaim as to all castings shown by actual test not to be up to the requirement, and respondent having failed to except to any of the conclusions in that regard, it stands as a verity in the case that appellant is entitled to recover on its counterclaim for the diminished value of the unused castings on account of their not being up to such requirement, if such diminished value be established by the evidence with sufficient certainty to permit of an assessment of damages being made.

By reason of the state of the case referred to, unexcepted to by respondent, there is no question of implied warranty nor any as to whether allowances were improperly made by the trial court, for failure of castings actually tested to come up to the required strength, that we need consider. Some such questions are discussed in respondent's brief, but may well be passed without further mention.

To enable appellant to recover for failure of the unused castings to come up to the contract requirements as to strength, it was not necessary to prove the amount of the de-

fectives nor the diminished value of the castings by reason thereof, with the certainty of a demonstration. All that was required was to establish such matters to a reasonable certainty. If more was required in judicially assessing damages many wrongs would go unrighted. It is familiar law that even loss of opportunity to make profits in a business is a proper subject for compensation in damages by the person producing such loss, and that proof of profits derived from such business covering a considerable period of operations furnishes a legitimate basis for determining the compensation recoverable for profits prevented through a discontinuance thereof produced by breach of contract. *Shepard v. Milwaukee G. L. Co.* 15 Wis. 318; *Treat v. Hiles,* 81 Wis. 280, 50 N. W. 896; *Kelley, M. & Co. v. La Crosse C. Co.* 120 Wis. 84, 90, 97 N. W. 674.

In the last case cited the court said:

"Only when the estimation of prospective profits involves such degree of speculation and uncertainty that it is likely to work injustice, rather than justice, should courts reject it if loss of profits is the result of the breach of the contract. . . . Past experience may establish with sufficient certainty what would have been the course and results of that business during a certain period of interruption" for the recovery of damages.

Applying the foregoing principle to the situation before us it would seem that if the evidence in this case shows that the 30,000 pounds of castings used, or attempted to be used, were fairly representative of the character of those that remained, then a legitimate basis was established for estimating damages as to the latter. As we read the record that was shown. The evidence quite satisfactorily proves that from the time appellant commenced using the castings till the last of the 30,000 pounds was handled a large percentage proved to be not up to the contract strength by reason of improper annealing and cold-shuts; that about twenty per cent. of the castings had latent defects causing them to break under the

pressure required to be put upon them and were wholly useless except for scrap iron. It does not seem necessary to refer to the evidence in detail on this subject. Since the defective character of the castings as to so large a quantity, including a number of invoices, was demonstrated by actual test, in the absence of any affirmative evidence to the contrary it is inferable, with sufficient certainty to sustain a finding as to the character of those that were not used, that they were likewise defective. To so conclude would not be indulging in mere guesswork, but in a fairly logical process of reasoning, similar to that by which past experience as to profits in a business forms a legitimate basis for determining prospective profits. In any case of the accumulation of a large quantity of manufactured articles, all of the same general kind, made at the same factory and from the same patterns or designs and a large proportion thereof proving defective in certain particulars, one would naturally conclude, in the absence of evidence to the contrary, that the balance of the lot is likewise defective. We are constrained to hold that a mistake was made on this branch of the case; that too high a standard of certainty as to the establishment of facts was held to be necessary in order to enable a finding to be made on the subject of damages. In many situations compensation for loss, wrongfully produced, is recoverable where neither the loss generally nor the amount of it can be established except to a reasonable certainty.

The quantity of the unused castings, as before indicated, as appears without substantial dispute, if any, was 42,212 pounds. The only direct evidence in the record as to the diminished value of such castings from the contract requirements on account of their being brittle and defective because of cold-shuts, places such diminished value at one and one-half cents per pound. That was corroborated by evidence as to the percentage that would probably break in placing the castings on hub cores, and extra cost of using them because of

their weakness. It seems that from the whole evidence the difference between the value of such castings as were contracted for and such as were furnished because of the contract requirements as to strength not being satisfied, is fairly measured by one and one-half cents per pound, or $638.18 for the unused stock. That entitles appellant to judgment against the plaintiff for $628.32 and interest from the time the counterclaim was interposed, to wit, January 10, 1903.

By the Court.—The judgment is reversed, and the cause remanded with directions to render judgment in favor of the defendant for $628.32 and interest from January 10, 1903, with costs.

STATE EX REL. VELIE, Appellant, vs. MORGAN, Respondent.

December 5, 1906—January 8, 1907.

Certiorari: *Special tribunals: Jurisdiction: Review: Officers: Delivery of books and papers to successor: Statutes: Imprisonment: Penalty: Enforcement.*

1. Under secs. 978, 979, 980, Stats. 1898 (providing that, if any person vacating an office refuses or neglects to deliver to his successor the books and papers of his office, complaint may be made by the successor to any judge of a court of record for the circuit or county where the person refusing resides, whereupon, after order to show cause, he shall be brought before such magistrate, and, unless he makes affidavit that he has delivered over all such books and papers, the judge shall, by warrant, commit him to jail, to remain until he shall deliver such books and papers or be otherwise discharged according to law), defendant M. petitioned the county judge of Waupaca county, alleging that V., the relator herein, had been removed from office, and that, M. having been duly appointed thereto, V. retained, and against M.'s demand refused to deliver, the books and papers in his custody. *Held:*

(1) The proceeding before the county judge was not a special proceeding in court, but one before a special tribunal not

proceeding according to the course of the common law, nor as a court.

(2) The statutes providing no method of direct review either by appeal or otherwise, the action of the county judge was final, if he acted within and according to his jurisdiction.

(3) The acts of the county judge were subject to review on *certiorari* to the extent of ascertaining whether they were within the jurisdiction conferred.

(4) The circuit court had authority to issue its writ of *certiorari* to bring before it the record of the proceedings of the county judge for examination.

2. Under secs. 978, 979, 980, Stats. 1898, the jurisdiction conferred is confined to discharging the accused officer when he makes affidavit of having delivered over his books and papers to his successor, or, in the absence of such affidavit, if it shall appear that the books and papers are withheld, then to commit the recalcitrant officer to jail until he shall deliver them over.

3. Under secs. 978, 979, 980, Stats. 1898, the magistrate before whom is brought an officer who has neglected or refused to turn over the books and papers of his office to his successor has no jurisdiction to impose a fine and enter an order that the recalcitrant officer shall be imprisoned and remain in custody until he pay such fine, in addition to turning over the books.

4. Although an outgoing officer who neglects or refuses to turn over to his successor the books and papers of his office may be liable to the penalty denounced by sec. 977, Stats. 1898, such penalty is to be recovered in a court, and not before the special tribunal provided in secs. 978, 979, 980.

APPEAL from a judgment of the circuit court for Waupaca county: CHAS. M. WEBB, Circuit Judge. *Reversed.*

Complaint was made by *David Morgan,* the present respondent, to the county judge of Waupaca county, under sec. 978 *et seq.,* Stats. 1898, alleging that the relator, *Velie,* having been removed from the office of treasurer of a certain school district, and the petitioner having been duly appointed thereto, the former retained, and against the latter's demand refuses to deliver, the books, papers, and money in his custody as such treasurer. After notice and hearing the county judge entered an order reciting such proceedings and the failure of *Velie* to make affidavit of delivering over all books and papers, and ordering and commanding the sheriff to take the

body of said *John Velie* and imprison him in the county jail "until he shall deliver the books and papers aforesaid, and pay a fine of $25 for violation of section 977, R. S. Wisconsin, or be otherwise discharged according to law." *Velie* sued out from the circuit court of Waupaca county a writ of *certiorari,* addressed to the county judge, to review these proceedings, alleging that meanwhile he had delivered over all the books and papers in his possession. Upon return disclosing such record the circuit court entered judgment affirming the order of the county judge and awarding *Morgan* costs, from which judgment the relator, *Velie,* brings this appeal.

For the appellant the cause was submitted on the brief of *John C. Hart,* and for the respondent on that of *E. L. & E. E. Browne.*

DODGE, J. Secs. 978, 979, 980, Stats. 1898, provide generally that, if any person vacating an office refuse or neglect to deliver to his successor the books and papers of his office, complaint may be made by the successor to any judge of a court of record for the circuit or county where the person refusing resides, whereupon, after order to show cause, he shall be brought before such magistrate, and, unless he make affidavit that he has delivered over all such books and papers, the judge shall, by warrant, commit him to jail, to remain "until he shall deliver such books and papers or be otherwise discharged according to law." This is not a special proceeding in court, but one before a special statutory tribunal not proceeding according to the course of the common law, nor as a court. *Prince v. McCarty,* 61 Wis. 3, 20 N. W. 655. No method of direct review is provided either by appeal or by application to the court from which such magistrate derives his power. Sec. 2815, Stats. 1898, which generally confers such right of review upon the court, is, by its terms, confined to orders made in actions or proceedings in courts of record. Since no such method of appeal or other direct

review has been provided, the action of the special tribunal is final, provided, of course, that it acts within and according to its jurisdiction. *State ex rel. Cook v. Houser,* 122 Wis. 534, 595, 100 N. W. 964. In all cases, however, the acts of such tribunals as above described are subject to review to the extent of ascertaining whether they are within the jurisdiction so conferred. *Starry v. State,* 115 Wis. 50, 90 N. W. 1014; *State ex rel. Augusta v. Losby,* 115 Wis. 57, 63, 90 N. W. 188. The revisory power over such tribunals is by the constitution (sec. 8, art. VII) vested in the circuit courts, with accompanying authority to issue writs of *certiorari* as well as others necessary or convenient to the exercise of that power. In view of these premises, no doubt can be entertained of the authority of the circuit court to issue its writ of *certiorari* to bring before it the record of a proceeding under sec. 978 *et seq.,* to the end that it may examine whether the magistrate has transgressed the jurisdictional limits imposed upon him.

The writ in the present case having been properly issued, the question was before the circuit court whether the order made by the county judge was within the jurisdiction conferred upon him. That jurisdiction is confined, first, to discharging the accused person when he makes affidavit of having delivered over all books and papers as prescribed in sec. 979, or, in absence of such affidavit, if it shall appear that books and papers are withheld, then, as already stated, to commit him to prison until he shall deliver them over. The statute confers no further power upon such tribunal, and, as it is wholly statutory, it can have no powers not granted in express terms, or at least by necessary implication. We search the statute in vain for any authority to such magistrate to imprison such a recalcitrant until he pays a sum of money in addition to turning over the books. Doubtless the portion of the order presented by this record which commands that relator remain in custody until he deliver the books and papers is within the jurisdiction of the magistrate in a proper

case, and no reason is urged why the petition and other evidence did not show this to be such. But the portion thereof which commands that he shall remain in custody and imprisonment until he pay a fine of $25 is wholly beyond and outside of any power conferred upon the magistrate, and is therefore necessarily void.

It is urged that by sec. 977 an outgoing officer recalcitrant in this respect is made subject to a penalty of not less than $25 or more than $2,000, and that the penalty here imposed upon the plaintiff in error is the minimum. This is no answer to the outrage upon his rights. Penalties are to be recovered in courts. Sec. 3294, Stats. 1898. And one is deprived of his rights who is subjected to such penalty and to imprisonment therefor except upon a judgment of some court.

By the Court.—Judgment reversed, and cause remanded with directions to enter judgment reversing and declaring void that portion of the order or warrant of the county judge of Waupaca county commanding that said *John Velie* remain in custody or imprisonment until he shall pay a fine of $25 for violation of sec. 977, Stats. 1898, but affirming all other portions of said order or warrant.

WILLIAMS, Appellant, vs. CITY OF HUDSON, Respondent.

December 5, 1906—January 8, 1907.

Dedication: Streets: Use of abutting lot as lateral support: Estoppel: Pleading.

1. Consent of plaintiff that the defendant city deposit earth upon the margin of her lot for the purpose of furnishing lateral support for the street constitutes a dedication of her property to that extent for a proper public purpose, and she is therefore estopped from requiring the city to remove the earth so deposited or from claiming damages caused thereby.

2. In such case allegations of the complaint, merely descriptive of the injury alleged to follow from an unlawful filling, are *held* insufficient to state a cause of action for negligent construction of the grade on her lot, whereby damage was caused from the flowage of water and the carrying of sand and other material onto her lot.

APPEAL from a judgment of the circuit court for St. Croix county: E. W. HELMS, Circuit Judge. *Affirmed.*

The plaintiff is owner of a lot abutting on Third street in the city of *Hudson.* In the year 1900 this street was graded by the proper authorities of the city of *Hudson.* This resulted in raising the street grade above the level of plaintiff's lot, from about one foot at the northeast corner to about seven feet at the southeast corner. No retaining wall was built by the city to prevent the earth of the higher street grade from sliding onto the lot of plaintiff; but, when the grading was being done, the plaintiff and the city by its proper authorities made an arrangement under which the city graded the street to its full width and to the line of plaintiff's lot, and plaintiff consented that the city place earth upon the margin of her lot in such quantity and in such a way as to form a lateral support for the earth of the street as so raised and graded. This condition continued until August, 1904, when plaintiff notified and demanded of the city authorities that they remove the earth so deposited upon her lot inside the margin of the street as and for a lateral support of the street as graded. This the city has refused to do, and she demands damages from the city for the injury to her use of the property consequent upon leaving this filling on her lot. Notice of the claim for such damages was presented to the common council and the claim was disallowed. The defendant avers that the plaintiff gave permission for the deposit of the earth upon her lot along the margin of the street; that earth was deposited upon her lot in the manner alleged by her pursuant to such permission and without her objection at that time; and that the city has left the earth so deposited on her

lot as a lateral support to the street. The case was tried before the court and jury. The jury found, in effect, (1) that plaintiff granted permission to the city to deposit earth upon and along the margin of her lot at the time the street was graded, and that this earth furnishes a lateral support for the street; (2) that the city so deposited this soil and earth upon her lot in reliance upon her permission and assent; (3) that plaintiff's damage from having such filling remain on her lot is $250. The court held that the plaintiff had established no cause of action and awarded judgment in defendant's favor for its costs. This is an appeal from such judgment.

John L. Gleason, attorney, and *R. M. Bashford,* of counsel, for the appellant.

A. J. Kinney, city attorney, for the respondent.

SIEBECKER, J. The plaintiff alleges that in the year 1900, when the city graded the street on which her property abuts, she gave the city permission to deposit the soil and loose earth upon her lot. The evidence contained in the bill supports the jury's finding that plaintiff and defendant's officers, at the time the grading of the street was undertaken, agreed that the city was to fill in and upon plaintiff's lot along the street to the height of the grade of the street and thence sloping to the natural grade of her lot, that she permitted this grading upon her lot to be done without objection, and that, although the street superintendent deemed the amount sufficient for the purpose, she requested that additional soil be so deposited. The effect of this transaction must control plaintiff's rights in this controversy. She now seeks to compel the city to remove this filling from her lot and thus take away the lateral support of the street grade, which was placed there with her permission and assent; and in default of such removal that she, as owner of the premises, be allowed compensation for any damage it may cause her.

Her ownership of the lot is in no way disturbed, and as such owner she may exercise as full control of it, up to the margin of the street, as before the lot grade was changed by this filling. No interference with her use of the lot in its altered grade has been attempted or contemplated. The only inquiry is whether plaintiff can require the city to remove the earth deposited on her lot under the circumstances of this case. To require the removal of the filling, by taking away the lateral support secured by filling plaintiff's lot under the arrangement admitted in her complaint and shown by the evidence, would result in a destruction of a part of the street as graded in conformity to it. It is obvious that the parties contemplated that the filling of plaintiff's lot to the height of the grade of the street was for the purpose of supporting the earth of the street as filled and graded. Plaintiff's consent to the filling of her lot for this purpose, the city's acceptance of the privilege, and its enjoyment to this time constitute a gift of the use of her lot to the public for maintaining a lateral support of the street in the manner agreed to by the parties. It is in nature and effect a dedication of her property for a proper public purpose, namely, the maintenance of the street. When property has been so devoted by the owner in fee, such use cannot be revoked by the owner. In *Connehan v. Ford,* 9 Wis. 240, the court, speaking on this subject, observes:

"The public do in fact acquire an interest in lands. . . . It is not supported upon the ground that it is a *grant,* but because the law considers it in the nature of an estoppel *in pais,* which debars the owner from recovering it. The law does not presume a *grant,* but rather the contrary, nor does it deprive the owner of his title to his land; but, while the dedication continues, says to him that he shall not, in violation of good faith to the public and by dishonest and immoral acts, assert his right of possession to the exclusion of the public."

Under the facts and circumstances it necessarily follows that plaintiff is precluded from now changing her position

in relation to the right of maintaining this filling, where it was placed, in reliance on her promise and assent, for permanently improving the street as contemplated by the parties at the time the arrangement was adopted between them and carried out. These conclusions follow from plaintiff's admitted conduct in giving the city the right to fill in her lot. This renders immaterial the exception urged to the reception and exclusion of testimony.

The claim that the court erred in ruling that the complaint does not state a cause of action for negligent construction of the grade on her lot, thereby causing her damage from the flowage of water and the carrying of sand and other material onto her lot, is not maintained. It is plain that the allegations relied on are not sufficient to state such a cause of action. They were evidently intended by the pleader, as they in fact are, to be descriptive of the alleged injury that the filling is unlawfully on her property, and thus causes her injury in these respects.

Judgment was properly awarded defendant for its costs and disbursements.

By the Court.—Judgment affirmed.

KOHL, Respondent, vs. BRADLEY, CLARK & COMPANY, Appellant.

December 5, 1906—January 8, 1907.

Sales: Warranty: Breach: Rescission: Action by buyer: Parties: Evidence: Notice of defects: Sufficiency: Appeal: Findings, when disturbed: Return of property after rescission: Waiver: Trial: Reception of evidence: Cross-examination: Production of documents: Notice, when necessary: Verdict: Special questions: Instructions to jury.

1. **In an action to recover the price of an engine upon a rescission because of breach of warranty it appeared, among other things, that plaintiff and B., as surety, signed a written order upon de-**

fendant for the engine; that such order directed defendant to furnish the engine to the signers of the order in care of W. & T., agents at M.; that such order contained the terms of sale and warranty, and that the order was accepted by defendant and the engine delivered through W. & T. *Held:*

(1) When the order was accepted the contract between plaintiff and defendant was closed.

(2) The contract was with defendant and not with W. & T.

(3) Plaintiff was the real party in interest.

2. In an action to recover the price of an engine upon a rescission because of a breach of warranty, the evidence, stated in the opinion, is *held* to support a verdict that the engine did not comply with the warranty.

3. In an action to recover the price of an engine upon a rescission because of a breach of warranty, a notice to the seller specifying defects, stated in the opinion, is *held* to have been sufficient.

4. In an action to recover the price of an engine upon a rescission because of a breach of warranty, the court submitted to the jury questions whether an expert, sent thirteen days after notice by the buyer of the defective condition of the engine, was sent within a reasonable time; whether the engine complied with the warranty; and whether within a reasonable time thereafter the defendant remedied the defects or offered to do so. *Held*, there being credible evidence to support findings in plaintiff's favor, that such findings should not be disturbed.

5. In an action to recover the price of an engine it appeared, among other things, that plaintiff had refused to accept the engine and rescinded the contract as soon as he discovered that the engine was not in compliance with the warranty under which it had been sold. *Held*, that plaintiff was within his rights, and that defendant could not avoid the rescission on the ground that the contract was executed.

6. In an action to recover the price of an engine upon a rescission because of a breach of warranty, it appeared, among other things, that the plaintiff returned the engine to defendant's agents through whom the sale had been made. The defense as to the sufficiency of the return was not based upon the failure to return to the proper place, but the right to return at all. *Held*, under the evidence, stated in the opinion, that the return to the agents was sufficient.

7. In such case there could be no waiver of the breach of warranty predicated on failure to render friendly assistance and co-operation and opportunity for a test, where, at the time the test was proffered, the sale had already been rescinded and the

engine returned, and the jury found that the test had not been seasonably proffered.

8. In an action to recover the price of an engine upon a rescission because of breach of warranty, it is not error to admit in evidence the order for the purchase of the engine, where the correspondence, as well as the delivery of the engine upon such order, showed an acceptance of the order.

9. It is not prejudicial error to permit a witness to answer a question as to his authority as agent where, though the answer was a conclusion, the evidence without the answer showed that the witness was such agent.

10. It is not error to refuse cross-examination of a witness where he is afterwards permitted to testify fully upon the subject.

11. In an action to recover the price of an engine on a rescission for breach of warranty it is not error to admit plaintiff's telegram: "Engine will not work—we shall return it to-morrow and demand our notes," sent after the engine had failed to comply with the warranty and after failure to send an expert to remedy the defects.

12. Plaintiff is not bound by the answer of the agent of the adverse party simply because called as a witness for the plaintiff.

13. It is not error to admit in evidence a copy of a telegram without previous notice to produce the original, where counsel for the objecting party states that his client did not have the original and never received such telegram.

14. It is not error to refuse to submit with a general verdict special questions where there was no request for a special verdict.

15. In an action to recover the price of an engine upon a rescission because of breach of warranty, it is not error to refuse to instruct the jury "that the defendant was not bound to teach the plaintiff how to start or operate the engine," there being no evidence in the case to which the instruction was applicable.

16. No error can be predicated on the language used by the court in the charge to the jury, where an examination of the charge shows that the language is hardly capable of the meaning ascribed, and in other parts of the charge the jury were fully and properly instructed on the subject.

APPEAL from a judgment of the circuit court for Dunn county: E. W. HELMS, Circuit Judge. *Affirmed.*

This action was brought by the plaintiff to recover the purchase price of a gasoline engine and freight charges upon rescission of contract of sale because of alleged breach of war-

ranty. The plaintiff claims to have purchased the engine from defendant, a Minnesota corporation doing business at Minneapolis, through its agents, Wright & Thum, implement dealers at Menomonie, Wisconsin. The contract of purchase was in the form of a written order given by the plaintiff and one John Brehm, ordering from the defendant in care of Wright & Thum, agents, the engine in question. On receipt of the order by defendant it shipped the engine, and the same was delivered to the plaintiff by Wright & Thum, agents of defendant. The plaintiff by the terms of the order promised to pay for the engine $253, and to execute and deliver to defendant two notes for said amount, one due November 1, 1903, and the other November 1, 1904, for $126.50 each. After delivery of the engine plaintiff claimed it was not in compliance with the warranty, and that the defendant failed to remedy defects. Plaintiff returned the engine to Menomonie, and afterwards commenced this action to recover the purchase price which he had formerly paid to defendant. The action is based upon rescission. The defense set up is that defendant sold the engine to Wright & Thum and they sold to plaintiff and one John Brehm, also denial that the engine failed to fill the warranty, and averment that plaintiff broke the conditions of the warranty and thereby waived his rights thereunder. The action was tried by the court and a jury, and a general verdict found for the plaintiff. Judgment was rendered on the verdict in favor of the plaintiff and against the defendant, from which this appeal was taken.

Charles S. Cairns, for the appellant.

For the respondent there was a brief by *Bundy & Varnum,* and oral argument by *R. E. Bundy.*

KERWIN, J. The order of purchase provides, in effect, that it was given subject to the acceptance of defendant, and further, under the head of "warranty," provides that the article sold shall be made of good material, well constructed, and

with proper use and management capable of doing well the work for which it is made and sold, and, if it fail in any respect to fill the warranty, written notice shall be given immediately by the purchaser to defendant at Minneapolis, Minnesota, by registered letter, stating particularly wherein it fails to fill the warranty and a reasonable time allowed to get to the machine with skilled workmen and remedy the defect, if any, and, if the defect be of such a nature that remedy cannot be suggested by letter, the purchaser to render all necessary and friendly assistance and co-operation for a fair test and trial by the company's experts.

The principal contentions of defendant are (1) that sale was not from defendant to plaintiff, but from Wright & Thum to plaintiff; (2) that there was a defect of parties plaintiff, John Brehm, who signed the contract, being a necessary party; (3) that the engine complied with the warranty; (4) that no notice was given in compliance with the warranty; (5) that no rescission could be had because the contract was executed. Defendant also assigns thirty-two errors alleged to have been committed by the court.

1. We think the evidence clearly shows that the sale was made by defendant. The order was a written order upon the defendant for the engine, signed by plaintiff and John Brehm, directing defendant to furnish the signers of the order the engine in care of Wright & Thum, agents at Menomonie, which order contained the terms of sale and warranty. This order was accepted by defendant, and the engine delivered through Wright & Thum. When the order was accepted the contract between plaintiff and defendant was closed. It was clearly a contract with defendant, and not with Wright & Thum. The evidence also shows clearly that Brehm merely signed as surety for plaintiff, and had no other interest. The plaintiff paid the notes given for the engine and the freight charges, and is the real party in interest. Therefore the action was properly brought in his name.

2. The main controversy in the case is that the engine satisfied the warranty, and that plaintiff failed to give it a fair trial. It is insisted by counsel for defendant that there is no evidence to support the verdict upon this proposition; that the evidence shows the engine did not receive proper use and management; that the treatment was such in making the test as to flood the engine with gasoline; and that failure to work properly was caused by such improper management and not because of defects in the engine. True, defendant offered evidence tending to prove its contention, and there is a sharp conflict in the evidence, much of it tending to support the claim that the engine was in compliance with the warranty. But the record shows considerable effort on the part of plaintiff to make the engine do the work it was warranted to do. Wright & Thum attempted to make it perform the warranty, and took to their assistance Christ. Hardy and C. Anderson. It is argued that Wright & Thum were not agents of defendant to operate the engine. Without determining whether this be true or not, Wright & Thum, who were the agents of defendant for some purposes at least, made an effort to operate the engine and failed. Manifestly they took an interest in getting it to work properly, but did not get satisfactory results, and finally concluded they could not make it comply with the warranty. They, with the assistance of Hardy and Anderson, failed to make it work, though several attempts were made to do so. The evidence shows that Hardy and Anderson had had considerable experience in operating gasoline engines, and obviously they were selected by Wright & Thum because of their competency. Thum, of the firm of Wright & Thum, had the engine taken to the foundry and repaired, but still it failed to work. The defendant urges that no sufficient test of the engine was made. Wright & Thum, however, set it up and started it, but failed to make it comply with the warranty, although they called to their aid men whom they regarded competent and who the evidence shows were

competent. The engine was warranted to do well the work for which it was made and sold, and we think there is ample evidence to support the verdict that it did not comply with the warranty.

3. It is insisted that no sufficient notice was given to defendant. Plaintiff notified defendant by letter December 13th that the engine was not running satisfactorily; that it would not run at all except for a little while at a time; that he had been able to saw only at the rate of two or three cords per day; that he was not able to say why it did not work, but that it did not, and asked defendant to send an expert at earliest convenience to find out what the trouble was. Plaintiff further stated in the letter: "Your agents attempted to make it run, but failed. It runs dry, and does not have power sufficient to run a saw." It is obvious from the evidence that the plaintiff gave as specific notice as he was able. He could not specify more particularly the defects because he did not know. The notice was sufficient. *Nichols & S. Co. v. Charlebois,* 10 N. Dak. 446, 88 N. W. 80. December 18, 1902, defendant replied to this notification, but refused to send an expert except at the expense of plaintiff. December 23, 1902, plaintiff notified defendant by telegram that the engine would not work, and that he would return it the next day. In compliance with this telegram plaintiff did return the engine to Wright & Thum and they refused to receive it. So he left it in a shed one block from their place of business and notified them of such delivery, and assumed no further control of it. December 26th, thirteen days after plaintiff gave notice of defects, and after defendant had refused to send an expert, it sent one. At this time the engine had been returned, and plaintiff refused to co-operate in testing it, claiming the contract of sale had been rescinded. The court submitted to the jury the question of whether the expert was sent within a reasonable time, and also whether the engine complied with the warranty; also whether notice had

been given as required by the warranty; and whether within a reasonable time thereafter defendant remedied the defects or offered to do so. These questions of fact were found by the jury in favor of the plaintiff, and under the repeated decisions of this court, if there is any credible evidence to support the verdict, the findings cannot be disturbed.

4. It is also urged that the plaintiff could not rescind, because the contract was executed. The plaintiff refused to accept, and rescinded as soon as he discovered that the engine was not in compliance with the warranty. This he had the right to do. It is well settled in this court that for breach of warranty the purchaser of the article may rescind the sale and recover his damages. *Fairfield v. Madison Mfg. Co.* 38 Wis. 346; *Fisk v. Tank*, 12 Wis. 276; *Parry Mfg. Co. v. Tobin*, 106 Wis. 286, 82 N. W. 154.

Some point is made on the return of the engine, defendant claiming that the return should have been to Minneapolis; also that plaintiff waived the warranty by not co-operating with the expert and rendering friendly assistance December 26th. The return to Wright & Thum, agents of defendant and parties through whom the sale was made to plaintiff, was sufficient under the evidence. The defense here is not based upon the failure to return to the proper place, but the right to return at all.

On the question of waiver because of failure to render friendly assistance and co-operation and opportunity for test, it is sufficient to say that at the time this test was proffered the sale had already been rescinded and the engine returned. If the expert had not been seasonably sent, plaintiff had the right to rescind. This question was submitted to the jury and found in favor of plaintiff.

5. Thirty-two exceptions were taken to alleged errors committed by the court. The admission in evidence of the order for the purchase of the engine was proper. The correspondence received as well as the delivery of the engine upon such

order by the defendant showed an acceptance of the order. The question which plaintiff's witness Wright was permitted to answer over objection in regard to his authority as agent was not prejudicial. Though a conclusion, it was harmless, since without this answer the evidence clearly showed that the witness and his partner did represent the defendant. The refusal to allow cross-examination of Wright respecting starting the engine was not error, and, even if it were, it was cured, since he was afterwards permitted to testify fully upon the subject.

The admission of plaintiff's telegram offering to return the engine after it failed to comply with the warranty and no expert had been sent to remedy it was not error. It was competent to give notice to defendant that plaintiff claimed the engine did not comply with the warranty and that he would return it. It is claimed that it was not competent to contradict the witness Thum, defendant's agent, who had testified for plaintiff, and that the admission of such evidence was error. Plaintiff was not bound by the answers of the witness Thum simply because he had called him as a witness. *Smith v. Ehanert,* 43 Wis. 181.

Error is assigned because copy of telegram was admitted without notice to produce original. But it appears no notice was necessary because defendant's counsel stated defendant did not have the original and never received any such telegram.

Error is assigned because the court refused to submit to the jury one question, "Was the engine in suit, with proper use and management, capable of doing well the work for which it was made and sold?" The defendant did not ask for a special verdict, hence was not entitled to have such question submitted. *Fenelon v. Butts,* 53 Wis. 344, 10 N. W. 501; *Schatz v. Pfeil,* 56 Wis. 429, 14 N. W. 628; *McDougall v. Ashland S. F. Co.* 97 Wis. 382, 73 N. W. 327.

Error is assigned because the court refused to charge the

jury "that defendant was not bound to teach plaintiff how to start or operate the engine." There is no evidence in the case that defendant was bound to teach plaintiff how to operate the engine, and it was very proper for the court to refuse the instruction.

Error is assigned because of certain language used by the court in the charge respecting the plaintiff's right to rescind for breach of warranty and failure to remedy defects within reasonable time. It is claimed that this language amounted to telling the jury that the plaintiff was entitled to rescind because of breach of warranty. But an examination of the charge shows that the language is hardly capable of the meaning ascribed to it. Besides, in other parts of the charge the jury were fully and properly instructed upon the subject, and the question whether there was a breach of warranty fairly submitted to them.

Other errors assigned have received careful consideration, but we do not regard them of such importance as to merit special consideration. We think no reversible error was committed, and that there is sufficient evidence to support the verdict.

By the Court.—The judgment of the court below is affirmed.

KYLE and another, Respondents, vs. CARPENTER and another, Appellants.

December 5, 1906—January 8, 1907.

Partnership: Realty as partnership assets: Pleading: Demurrer: Fraud: Resulting trusts: Statute of frauds: Parol evidence.

1. In an action to charge defendants as trustees holding the legal title to certain real estate for the plaintiff partnership, it was alleged in the complaint, among other things, that the defendant C. had been a member of a partnership with plaintiffs for

years, conducting business on the premises in dispute, the legal title to one third of which was in each partner in trust for the firm; that, the firm having dissolved by mutual consent, C. retired and sold to plaintiffs all his interest in the firm assets and property, including such real estate; that by the agreement of dissolution the plaintiffs assumed all obligations against the firm, released C. therefrom, and paid him the balance due him on such dissolution; that C. received such agreement, release, and payment in full satisfaction for his interest in the firm property, but failed to make conveyance thereof to plaintiffs; that thereafter the remaining partners for over eight years carried on the same business upon and were in the actual, open possession and occupancy of such real estate without objection or question by C.; that C. had, for the purpose of defrauding plaintiffs, wilfully and wrongfully, and in violation of the trust imposed, conveyed the legal title to such one third to his co-defendant, who accepted such conveyance, with full knowledge of the facts, for the purpose of defrauding the plaintiffs. The complaint prayed that defendants be adjudged to hold the legal title to such real estate in trust for said firm and for the plaintiffs. On appeal from an order overruling a demurrer to such complaint, *held:*

(1) The real estate in question was property belonging to the partnership up to the time of its dissolution.

(2) Although the complaint did not in express terms allege that C. agreed to convey to plaintiffs such legal title, such agreement was necessarily implied from allegations that plaintiffs purchased the real estate from C. and paid him in full the agreed purchase price.

(3) C.'s refusal to convey the legal title to the lands to plaintiffs and his conveyance to his co-defendant was a breach of a trust and a fraud on the plaintiffs.

(4) The transaction between plaintiff and C. did not create an express trust within the calls of sec. 2081, Stats. 1898, but a resulting trust within the calls of sec. 2076 (excepting from the chapter on uses and trusts those arising or resulting by implication of law).

(5) The demurrer was properly overruled.

2. Real estate purchased for partnership purposes and appropriated to those purposes and necessary therefor, always becomes partnership property, and it is immaterial in what manner, or by what agency, the land is bought, or in what name it stands. The partner holding the legal title to land, however it may have come to him, will be held as trustee for the partnership, if it be certain that the land was in fact a part of their joint property as partners.

3. Where a partnership holds land not as the chief purpose of its existence, but as an incident to its business, the statute of frauds does not apply, and the land may be shown to be part of the partnership stock and affected with partnership equities by oral evidence.
4. Real estate so purchased and held is in equity not only considered as the property of the firm for the payment of its debts, but also for the purpose of adjusting the equitable claims of the copartners between themselves.

APPEALS from orders of the circuit court for Dunn county: E. W. HELMS, Circuit Judge. *Affirmed.*

Each of the defendants separately appeals from the order overruling his demurrer to the complaint, seeking to charge the defendants as holding the legal title to the undivided one-third of the real estate described for the firm of Kyle Bros. & Co. and the plaintiffs. The complaint alleges, in effect, that on and for some time prior to December 13, 1893, these plaintiffs and one H. T. C. were copartners, doing a general mercantile business at Downsville, Wisconsin; that at the time of the formation of that copartnership the firm purchased the seventy acres of real estate therein described and the fifteen acres of real estate therein described, with the store building and the elevator building thereon, and such real estate was conveyed to such copartners—the plaintiffs and H. T. C.—jointly and in trust for such firm; that during the existence of such copartnership such real estate was by them considered and treated as partnership property, and the firm was charged with the same, and each individual partner was credited with his share thereof on the books of said firm, and said partnership business was carried on upon said real estate; that December 13, 1893, said H. T. C. retired from said firm and sold to these plaintiffs, and these plaintiffs purchased, all the right, title, and interest of said H. T. C. in and to the property of such firm, including such real estate. At or about the same time it was agreed by and between these plaintiffs and the defendant *Curtiss* that said *Curtiss* would

take the interest which said H. T. C. had in such partnership property and would become a member of such firm with the plaintiffs and continue the mercantile business of such old firm; that in pursuance of such agreement said new firm of Kyle Bros. & Co. did enter into and conduct such business, and said *Curtiss* agreed to pay such firm $2,795.03 for one-third interest therein, and charged himself on the books of said firm with the sum of $1,000, and executed his note to said firm for $1,500 in pursuance of such agreement; that these plaintiffs caused said H. T. C. to convey to said *Curtiss* the legal title of the undivided one-third of such real estate; that during all the time said new partnership was in existence its assets consisted of a stock of merchandise and said real estate, with the store building in which such business was carried on and the elevator thereon situated, all of which was considered and treated as partnership property, and said new firm was charged therewith on its books, and each of these plaintiffs and said *Curtiss* was credited with one third of the value thereof, and said partnership business was carried on upon said real estate and used exclusively in such partnership business; that all of said real estate and said personal property was the property of said partnership, and the legal title to said real estate was in said plaintiffs and said *Curtiss* in trust for said partnership; that May 25, 1897, said partnership was dissolved by mutual consent, said *Curtiss* retiring from the firm and selling to these plaintiffs, and these plaintiffs buying, all the right, title, and interest of said *Curtiss* in said partnership property; that it was further agreed by the terms of such agreement of dissolution that these plaintiffs would assume all obligations against said firm; that they would release said *Curtiss* from any obligation to said firm, including the $1,500 note and indebtedness of said *Curtiss,* given at the time he purchased an interest in said firm and which still remained unpaid, and further agreed to give *Curtiss* credit on the books of said firm of $500; that after

giving him such credit there was still due to him from such firm $322.59, which amount these plaintiffs paid to said *Curtiss* and he received the same in full payment and satisfaction of his interest in said firm and its property of every kind; that ever since such time, May 25, 1897, these plaintiffs have carried on such business under the firm name of Kyle Bros., and have been in the actual and open possession and occupancy of said real estate, and the said *Curtiss* has never made any claim thereto, except by the making of the deed of said premises to one *Carpenter* as hereinafter alleged; that October 9, 1905, the said *Curtiss* wilfully and wrongfully, and in violation of the trust in which he held such real estate, did execute and deliver to the defendant *Carpenter* a deed to an undivided one-third of such real estate; that said *Carpenter* wilfully and wrongfully, and for the purpose of defrauding these plaintiffs, accepted such deed and caused the same to be recorded in the office of the register of deeds October 12, 1905, and has since such time claimed to be the owner of such undivided one-third of said real estate by virtue of such deed; that at the time of accepting such deed said *Carpenter* well knew that these plaintiffs were the real owners of such real estate and that said *Curtiss* held the legal title thereof in trust for them.

C. M. Hilliard, for the appellants.

For the respondents there was a brief by *Bundy & Varnum* and *J. W. McCauley,* and oral argument by *R. E. Bundy.*

CASSODAY, C. J. The facts alleged in the complaint are of course admitted by the demurrer. From such facts it appears that after the defendant *Curtiss* had been in partnership with the plaintiffs about three and one-half years under the firm name of Kyle Bros. & Co., conducting the business mentioned upon the premises described, the firm was dissolved by mutual consent, *Curtiss* retiring from the firm and selling to the plaintiffs all his right, title, and interest in and

to the assets and property of the firm, including said real estate, and in consideration therefor the plaintiffs, in and by the agreement of dissolution, assumed all obligations against the firm and released the said *Curtiss* from any and all obligations to the firm, including his indebtedness mentioned, which was thereupon credited to him on the books of the firm, and the plaintiffs also paid to said *Curtiss* the balance due him on such dissolution; and said *Curtiss* received such release, agreements, and payment in full satisfaction for his undivided one-third interest in and to the assets and property of said firm of every kind, including said real estate, but said *Curtiss* failed to make any conveyance of said real estate to plaintiffs. It further appears that ever since May 25, 1897, the plaintiffs have carried on such business under the firm name of Kyle Bros., upon and in the actual and open possession and occupancy of said real estate, without any objection or question from said *Curtiss,* and that for the purpose of defrauding the plaintiffs the said *Curtiss* on October 9, 1905, wilfully and wrongfully and in violation of the trust reposed in him conveyed the legal title to the undivided one-third interest in said real estate to the defendant *Carpenter,* who wilfully and wrongfully, and with full knowledge of the facts stated, accepted such conveyance for the purpose of defrauding the plaintiffs.

Upon the facts stated it s difficult to perceive upon what theory the defendants can withhold from the plaintiffs the legal title to the lands in question. They were property which belonged to the partnership up to the time of its dissolution. The terms of dissolution were mutually agreed upon. In such mutual agreement the plaintiffs assumed all obligations against the firm and released *Curtiss* from any and all his indebtedness to the firm. By such agreement the plaintiffs were to have all the right, title, and interest of *Curtiss* in the partnership property, including the real estate, for which the plaintiffs paid him the agreed price, which *Curtiss* received in full

payment and satisfaction for such right, title, and interest. True, the complaint does not in express terms allege that *Curtiss* agreed to convey to the plaintiffs such legal title, but it does allege that the plaintiffs purchased the real estate from *Curtiss* and paid him in full the agreed purchase price, and this necessarily implied an agreement to so convey. The agreement thus made between the parties was fully executed, except that *Curtiss* failed to convey such legal title to the plaintiffs. The prayer of the complaint is that the judgment shall declare and establish that the respective defendants held and hold the legal title to the undivided one-third of said real estate in trust for the firm of which *Curtiss* was a member and for these plaintiffs. It is true, as argued by counsel for the defendants, the transaction did not create an express trust within the meaning of the statutes. Sec. 2081, Stats. 1898. The chapter in which that section is found abolishes "uses and trusts, except as authorized and modified" therein, but declares that the sections of that chapter shall "not extend to trusts arising or resulting by implication of law." Sec. 2076, Stats. 1898. Such resulting trusts have frequently been recognized and enforced by this court. *Whiting v. Gould,* 2 Wis. 552; *Orton v. Knab,* 3 Wis. 576; *Martin v. Morris,* 62 Wis. 418, 22 N. W. 525; *Davenport v. Stephens,* 95 Wis. 456, 458, 70 N. W. 661.

It is elementary that "real estate purchased for partnership purposes and appropriated to those purposes, paid for by partnership funds and necessary for partnership purposes, always becomes partnership property. Nor does it seem to be material in what manner, or by what agency, the land is bought, or in what name it stands." Parsons, Partn. (4th ed.) § 265. In the same section it is said:

"We consider it an established rule in equity that any party holding the legal title to land, however it may have come to him, will be held as trustee for the partnership, if it be certain that the land was in fact a part of their joint property as partners."

Another text-writer says:

"Where a partnership holds land not as the chief purpose of its existence, but as an incident to its business, the statute of frauds does not apply, and the land may be shown to be part of the partnership stock and affected with partnership equities by oral evidence." 1 Bates, Partn. § 301.

Such statements are amply supported by adjudged cases. Among others, see *Fairchild v. Fairchild,* 64 N. Y. 471; *Greenwood v. Marvin,* 111 N. Y. 423, 19 N. E. 228; *Sherwood v. St. P. & C. R. Co.* 21 Minn. 127; *Marsh v. Davis,* 33 Kan. 326, 6 Pac. 612. Such real estate, so purchased and held, is in equity not only considered as the property of the firm for the payment of its debts, but also "for the purpose of adjusting the equitable claims of the copartners as between themselves." *Smith v. Tarlton,* 2 Barb. Ch. 336. Here, upon the dissolution of the firm and in the adjustment of such equitable claims between the partners, *Curtiss* was to convey his legal title to the lands to plaintiffs; and his refusal to do so and his conveyance to *Carpenter* was a breach of trust and fraud on the plaintiffs. In the opinion of the trial court the facts alleged entitled the plaintiffs to a specific performance of the contract to convey to them the legal title to the real estate. Of course the power of courts to compel specific performance is not abridged by the statute of frauds. Sec. 2305, Stats. 1898. The complaint does not in terms pray for such specific performance, and so we refrain from further considering the question here. We perceive no ground for claiming that the cause of action alleged is barred by the statutes of limitation.

By the Court.—Both orders of the circuit court appealed from are affirmed.

TWENTIETH CENTURY COMPANY, Respondent, vs. QUILLING, Appellant.

December 5, 1906—January 8, 1907.

Patents and patent rights: Notes given for territory: Validity: Consideration: Compensation for effecting sales: Public policy: Pleadings: Amendment: Parol evidence.

1. It is competent for the owner of a patent to sell an exclusive right to vend the device in a given county and take a note therefor.
2. Such note is valid and enforceable in full (in the absence of fraud) notwithstanding the fact that the value of the right sold is greatly overestimated.
3. A valid patent on a useful article is a sufficient consideration for a note, though the patent may never be profitable.
4. Where the owner of a patent sells an exclusive right to vend the device in a given county it is competent to agree that, in case the vendee induces others to purchase county rights of sale, the vendee shall receive as his compensation a specified part of the purchase price of such rights so purchased.
5. Plaintiff, a patentee, and defendant entered into a written contract giving defendant a county right to sell the patented article, which also contained an agreement that, if defendant should induce others to purchase county rights, he should receive a specified proportion of the sums realized from such sales. In an action on defendant's note given in part payment on such contract, defendant sought by amendment to set up a defense, substantially, that the written contract, while containing some of the conditions of the real agreements made, was largely a mere cover executed to give appearance of fairness and legality to the arrangement; that neither party contemplated that the right to sell the device in defendant's county was of any real commercial value, or that defendant would make any effort to make such sales; that the real arrangement was a joint scheme to make money by selling similar nominal territorial rights to others who should also become parties to the scheme and sell similar territorial rights to still others, and so on, the process to go on in constantly broadening circles as long as purchasers could be found, and thus necessarily leave the ultimate purchasers with nothing to show for their investment save the practically worthless right to sell the patented device in some remaining county. The trial court re-

fused to allow the amendment on the ground that it stated no defense, and also rejected offers of proof of facts tending to support the proposed amendment. *Held:*

(1) The proposed amendment stated a defense and should have been allowed.

(2) The enterprise disclosed by the proposed amendment was contrary to public policy and void.

(3) It was not sufficient that the device was of some utility and value, in the face of allegations that the right to sell it was of merely nominal commercial value on account of the great number of equally useful devices of the same nature, and was not considered in the transaction except as a means of giving an appearance of validity and honesty.

6. When an agreement is against public policy the parties cannot, by reducing some unobjectionable parts of it to writing, prevent the reception of parol evidence to show the entire agreement, although it may be inconsistent with the written paper.

APPEAL from a judgment of the circuit court for Dunn county: JAMES O'NEILL, Judge. *Reversed.*

This is an action to recover upon a promissory note of $400 executed by the defendant to the plaintiff March 23, 1904, on which $100 is admitted to have been paid. The defendant by answer alleged in substance that the note in question was executed solely in consideration of an illegal and void contract made at the same time, by the terms of which defendant was to have the exclusive right to sell to residents of Gates county a certain patent pole and thill coupling, to be manufactured by plaintiff at prices specified, as well as the privilege of selling to other residents of Wisconsin the exclusive right to sell such couplings in other counties; the plaintiff agreeing to pay him one half the cash and notes received on such sales of territory to residents of Gates county secured by him and one fourth the cash and notes received from sales of territory to residents of said county not secured by him, also one half the cash and notes received from sales of territory to residents of the state secured by him, provided the county from which such sale was made was unsold to others, and in that case to pay him one fourth the cash and

notes received from such sale. And it was further agreed that each person to whom a sale was made should have the same right as the defendant to sell exclusive territorial rights in other counties, and purchasers from him still the same rights, and so on without limit. The answer further alleges that the right to sell such couplings in Gates county was of no value and known to be of no value by the parties, and did not form any part of the inducement to make said contract, but that the sole inducement was the right to sell other territorial rights in other counties, with the right of resale thereof in the purchasers. Two counterclaims are also pleaded, which are unnecessary to be stated. The plaintiff replied, alleging that the note was made in consideration of a written agreement and not otherwise, and denying any representation, warranty, or agreement other than those contained in such written agreement. A copy of the written agreement was attached to the reply, and is as follows:

"Articles of agreement made and entered into this twenty-third day of March, 1904, by and between the *Twentieth Century Company,* a Wisconsin corporation, of Tomah, Wisconsin, party of the first part, and *Herbert W. Quilling* of Menomonie, county of Dunn, state of Wisconsin, party of the second part, witnesseth: The said party of the first part, for the considerations hereinafter mentioned, has agreed and does hereby covenant, promise, and agree: 1st. To grant and does hereby grant to said party of the second part the exclusive right and privilege of reselling its pole and thill coupling patent No. 718,893, with double spring improvement, in the county of Gates and state of Wisconsin, to residents only of, and for use in, said Gates county, for a term of seventeen years from January 20, 1903. 2d. To sell said pole and thill coupling to said second party in any quantity he may wish to purchase for the purpose of reselling same, in manner, as above specified, in the above granted territory, at $3 per dozen with single spring, at $3.60 per dozen with double spring, and at $9 per dozen nickel plated, f. o. b. factory, during the continuance of this contract. 3d. To pay said second party one half of the cash and one half of the notes

received from sales of territory to residents of said county secured by him. 4th. To pay said second party one fourth of the cash and one fourth of the notes received from sales of territory to residents of said county, not secured by said party. 5th. To pay said second party one half of the cash and one half of the notes received from sales of territory to residents of the state of Wisconsin, secured by said second party, provided that the county from which said sale is made is unsold to others, and in that case to pay said second party one fourth of cash and one fourth of notes received. No payments to be made on this contract until note given therefor has been fully paid; in case of any dispute arising over division of commission earned hereunder, the decision of the purchaser shall in all cases be final, conclusive, and binding on all parties hereto. (This contract is operative only when countersigned by D. W. Jackson.) And said second party in consideration of the above has agreed and does hereby promise and agree to pay said first party five hundred ($500) dollars on the signing of this agreement, and that he will make sales of said pole and thill coupling strictly in accordance with the right and privilege herein granted."

Trial by jury was waived, and the case came on for trial before the court. The plaintiff offered the note, contract, and its articles of incorporation in evidence, and rested, its ownership of the patent being admitted. The defendant was then called as a witness in his own behalf, and after stating that he met the plaintiff's agent March 23, 1904, he was asked what conversation he had with the agent in regard to the business in question. Objection was made to the question on the ground that any oral arrangements were merged in the written agreement, and the court sustained the objection, and also ruled that the written agreement was a valid agreement. Thereupon the defendant offered to amend his answer by adding to it allegations to the effect that the contract between himself and the plaintiff was partly oral and partly in writing; that a part of the contract was that plaintiff agreed to make effort to obtain purchasers of territory under similar contracts; that it was understood that the right to sell terri-

tory and induce others to make similar contracts was, in fact, the sole consideration for the giving of the note, and that the right to sell couplings in Gates county was not of any real value, but was inserted for the purpose only of giving it an appearance of legality; that it was also agreed and understood that it should not be made known to persons who were to be induced to make like contracts how many counties remained unsold; that said contract, when carried out as contemplated, would result in a large number of people being cheated and defrauded by reason of there being no remaining counties unsold, and that the understanding was that the plaintiff was not to sell couplings, but that he was only to endeavor to make money by selling territory and inducing others to make like contracts, the result contemplated being that the first persons to go into the scheme would make money, and the persons who bought later would lose money. The amendment was rejected on the ground that it stated no defense, and offers to make proof of facts tending to support the proposed answer were also rejected. The testimony was then closed, and the court found that the transaction was valid and free from illegality and rendered judgment for the plaintiff for the amount unpaid on the note, from which judgment the defendant appealed.

For the appellant there was a brief by *Bundy & Varnum,* and oral argument by *R. E. Bundy.*

Daniel H. Grady, for the respondent.

WINSLOW, J. The general question presented is whether a transaction such as is alleged in the proposed amended answer is contrary to public policy. The plaintiff owned a valid patent upon a small device designed for use upon buggies and carriages which was of some utility. It was perfectly competent for the plaintiff to sell an exclusive right to vend the device in a given county and take a note therefor, and such note would be valid and enforceable in full (in the

absence of fraud), notwithstanding the fact that the value of the right sold might be greatly overestimated. A valid patent on a useful article is a sufficient consideration for a note, though the patent may never be profitable. It was also competent for the plaintiff to agree with the defendant that, in case defendant induced others to purchase county rights of sale, he should receive as his compensation a specified part of the purchase price of such rights so purchased. Upon its face the written contract entered into between the parties went little, if any, further than to provide for these two things, and, if the proposed defense were based upon the written contract alone, we should entertain no doubt of the correctness of the judgment. The written contract is similar in most of its essential features to the agency contract involved in the case of *J. H. Clark Co. v. Rice,* 127 Wis. 451, 106 N. W. 231. In that case, however, the defendant stood upon the written contract, while in the present case an entirely different defense was proposed. By his amended answer he proposed to set up a defense substantially as follows: That the written contract, while containing some of the conditions of the real arrangement made, was largely a mere cover executed to give appearance of fairness and legality to the arrangement; that neither party contemplated that the right to sell the device in Gates county was of any real commercial value, or that the defendant would make any effort to make such sales; that the real arrangement was a joint scheme to make money by selling similar nominal territorial rights to others who should also become parties to the scheme and sell similar territorial rights to still others, and so on—the idea being that the process should go on in constantly broadening circles as long as purchasers could be found who were foolish enough to buy, and thus necessarily leave the ultimate purchasers with nothing to show for their money or notes save the practically worthless right to sell the patented device in some backwoods county.

We are unable to regard such a project as a legitimate business enterprise. How large would be the number of purchasers who would be induced by the prospect of large returns for little labor to join the scheme it is impossible to say or even speculate. Each purchaser would be desirous to get back at least as much as he had invested. In order to do this, the first purchaser under the most favorable circumstances would have to sell rights aggregating $1,000, the second purchaser would have to sell rights aggregating $2,000, and thus the necessity of finding victims would increase in geometrical progression until the purchasers who are in the tenth place from the original purchasers must, in order merely to reimburse themselves, find others who would pay more than half a million dollars. Of course, it is not likely that the scheme would last so long as this, but, however long it lasts, it will infallibly leave a greater or less crowd of dupes at the end with no opportunity to recoup their losses because the bubble has at last burst. It contemplates an endless chain of purchasers, or, rather, a series of constantly multiplying endless chains, with nothing but fading rainbows as the reward of those who are unfortunate enough to become purchasers the moment before the collapse of the scheme. While contemplating large gains to the original promoters and early purchasers, it necessarily contemplates losses to the later purchasers; losses increasing in number with the greater success of the scheme. According to the allegations of the answer it was not an arrangement to sell patent couplings, nor even an arrangement to sell territorial rights in the patent, but an arrangement to become partners in an enterprise which under the form of selling territorial rights contemplated only the obtaining of easy money from others who were to be induced to pay in their money under the golden prospect of like recoupment from still others, until the mine was exhausted.

Such an enterprise we regard as contrary to public policy and void. Any contract which contemplates or necessarily

involves the defrauding or victimizing of third persons as its ultimate result must be *contra bonos mores.* Greenhood, Pub. Pol. 152. In its essential features it is not to be distinguished from the *Bohemian Oats Cases* or the *Coupon Cases,* where similar endless chains have been vigorously condemned by the courts. *McNamara v. Gargett,* 68 Mich. 454, 36 N. W. 218; *Davis v. Seeley,* 71 Mich. 209, 38 N. W. 901; *Merrill v. Packer,* 80 Iowa, 542, 45 N. W. 1076; *Schmueckle v. Waters,* 125 Ind. 265, 25 N. E. 281; *Shirey v. Ulsh,* 2 Ohio Cir. Ct. 401; *Hubbard v. Freiberger,* 133 Mich. 139, 94 N. W. 727; *Bonisteel v. Saylor,* 17 Ont. App. 505. Nor does it avail to say that the patented article was of some utility and value, inasmuch as under the allegations of the proposed answer it is alleged that the right to sell the patented couplings was of merely nominal commercial value on account of the great number of equally useful devices of the same nature, and was not considered in the transaction except as a means of giving it an appearance of validity and honesty. It goes without saying that, if the actual agreement between the parties was such as is in the amended answer set forth and was an agreement against public policy, the parties cannot, by reducing some unobjectionable parts of it to writing, prevent the reception of parol evidence to show the entire agreement, although it may be inconsistent with the written paper. The rule prohibiting the introduction of parol contemporaneous agreements to contradict or vary a written agreement has no application to such a situation. It may always be shown by parol that a written contract was made in furtherance of an illegal purpose or object. 1 Elliott, Ev. § 591.

It follows from these considerations that the proposed amended answer stated a defense and should have been allowed.

By the Court.—Judgment reversed, and action remanded for a new trial.

HODGE and another, Appellants, vs. SMITH and others, Respondents.

December 5, 1906—January 8, 1907.

Appeal and error: Findings of fact, when disturbed: Trial: Pleading and proof: Variance: Bills and notes: Conditional execution and delivery: Fraud: Parol evidence: Holder in due course: Defective title: Payment of consideration: Notice: Evidence: Burden of proof.

1. In determining on appeal whether the trial court erred in holding that any particular issuable fact or facts were established without room for reasonable minds to reasonably differ in respect thereto the decision below should not be disturbed unless it clearly appears to be wrong.
2. If a material allegation of the complaint is not established in the exact detail of the charge but is as to the substance thereof the variance is not material.
3. If a person secures signatures to a note under a promise that the paper shall not be regarded delivered as a binding obligation till others, specified by name or as to numbers, shall have signed and then secures the unconditional signatures of part only of such others, keeping silent as to the conditional character of the former signatures, the latter are to be regarded as having been obtained by fraud.
4. If a promissory note, in form, is delivered by the maker to the payee, the act being accompanied by a verbal agreement that the instrument shall not take effect till some specified condition shall have been performed, as that other persons specified by name or number shall have signed, the paper, as between the original parties, will have no validity till the condition shall have been satisfied.
5. In the circumstances last stated, proof of the contemporaneous verbal agreement does not violate the rule that a written instrument cannot be varied by proof of a verbal promise, since such proof only goes to the question of whether the paper ever had vitality as a contract.
6. In the circumstances above stated, if the condition is that certain other signatures shall be obtained, only part of which are thereafter secured, they signing unconditionally and without being informed of their co-makers having signed conditionally and they are prejudiced thereby, in that the paper does not take effect as to such conditional makers, they may defend on

the ground of fraud, while such co-makers may defend on the ground of the paper never having been delivered, so long as the same remains in the hands of the original holder or any subsequent holder not having obtained the same in due course.

7. A holder of commercial paper in due course is one who takes the same when (a) it is complete and regular upon its face; (b) he became the holder of the paper before it was overdue and without notice that it had been previously dishonored, if such was the fact; (c) he took it in good faith and for value; (d) at the time it was negotiated to him he had no notice of any infirmity in the instrument or defect in the title of the person negotiating it; and (e) he took it in the usual course of business.

8. The transferee of commercial paper is not the holder thereof in due course, unless he has paid the full amount agreed to be paid therefor without notice of any infirmity in the instrument or in the title of the transferrer,—except to the amount thereof so paid.

9. The title of a person who negotiates commercial paper is defective when he shall have obtained the instrument or any signature thereto by fraud or negotiated it in breach of faith or fraudulently.

10. The holder of commercial paper is *prima facie* presumed to be a holder in due course, but in case of its appearing that the title of any person who negotiated the paper was defective then the holder in order to recover must show that he or some person under whom he claims acquired the title as a holder in due course.

11. In the circumstances last stated, proof that a full consideration was paid for the paper *prima facie* establishes that it was taken in due course.

12. Proof that when the paper was taken the consideration was placed to the credit of the seller on the books of the purchaser subject to the former's order, does not constitute payment.

13. Ordinarily in the circumstances stated in the last paragraph the burden of proof is on the defendant to show that the debt represented by the credit was not paid, but in the circumstances stated in number 10 the burden is on the purchaser.

[Syllabus by MARSHALL, J.]

APPEAL from a judgment of the circuit court for Pepin county: E. W. HELMS, Circuit Judge. *Affirmed.*

Action to recover on three promissory notes dated February 18, 1903, one for $934, and two for $933 each, made by the

defendants, payable to the order of Robert Burgess & Son, with six per cent. interest per annum payable annually, the first one being made payable July 1, 1904, the second July 1, 1905, and the third July 1, 1906. Each note provided that in case of any delinquency to meet it as to principal or interest the whole should become immediately due. The complaint contained a cause of action stated in the usual form as to each note, the two causes of action as to the notes not due on their face containing sufficient allegations to show that they were due under the condition before mentioned. Defendants *Smith, White, Andrew Lark, Stranberg, Anderson,* and *A. P. Lark* answered jointly. Defendants *Dunn, Engel, Heitman,* and *V. Brownlee* answered jointly. Defendants *Smith, Andrew Lark,* and *A. P. Lark* joined in an amended answer, defendant *Frank* answered separately, and the defendant *Stranberg* interposed an amended answer. By these several answers, as to all defendants, issue was taken on the allegations of the complaint as to plaintiffs having become owners of the notes for value in due course before due, and as to whether the second and third notes became due before the commencement of the action. A defense was pleaded as to all defendants, that the notes were given for a stallion sold with certain specified warranties and representations, among them being one that the animal was but three years of age, and that such representations were false. Further defense was pleaded that each and all defendants signed the notes under an agreement that they were to be signed by Otto Jahnke and R. J. Hall and were not to take effect till so signed, and that neither of such persons did so. Defendants *Dunn, Engel, Heitman,* and *Brownlee* pleaded that they signed the notes with the understanding that they should not be held liable; that their signatures were wanted only to make it appear that they were actual purchasers of shares in the horse. Defendant *Frank* answered specially that he never executed the note. Defendant *Stranberg* answered specially that he was induced to sign

through threats, fraud, and duress practiced upon him by the agent for the sellers of the horse; that he signed a book agreeing to take a share in the animal and to sign the note, but that he did not recollect it when asked to sign the note; that his name was placed on the book when he was so intoxicated that he did not know what he was doing; that his signature was subsequently exhibited to him and he was threatened with being sent to state's prison if he did not sign the notes, and that being thereby frightened and through his inexperience, being ignorant of his rights, he signed the notes.

At the close of the evidence the court directed a verdict in favor of the plaintiffs against defendants *Smith, Andrew Lark,* and *A. P. Lark* as to the first note, and a verdict in the latter's favor as to the other notes, and otherwise submitted the cause to the jury, resulting in a verdict in plaintiffs' favor for the full amount claimed. Thereafter upon due application the verdict directed in plaintiffs' favor was set aside and the verdict otherwise rendered in plaintiffs' favor was also set aside, as said by the court, "for errors of the court in so directing a verdict and in submitting certain issues to the jury and instructions thereon." Thereupon, on motion of the defendants, judgment was ordered in their favor and was accordingly rendered.

For the appellants there was a brief by *Barnes & Magoon,* attorneys, and *C. A. Ingram,* of counsel, and oral argument by *R. M. Barnes.*

For the respondents there was a brief by *W. C. Owen* and *W. E. Plummer,* and oral argument by *Mr. Plummer.*

MARSHALL, J. If the grounds upon which the learned circuit court rendered judgment in favor of respondents were legitimate, then, manifestly, error of law was committed in submitting the cause to the jury, and in the instructions. Therefore, we will not give consideration to the subject of whether error was committed in setting aside the verdict, un-

less it shall appear that the subsequent action complained of was erroneous.

The bases of the order for judgment, notwithstanding the verdict, so far as need to be noticed, appear to be: (a) The evidence is undisputed that the vendors of the horse, by their agent, falsely represented the animal's age; (b) The evidence is likewise conclusive that such vendors obtained the signatures of all of the respondents to the notes upon condition that in addition to such signatures Otto Jahnke and R. J. Hall should sign, making the full number of share-takers in the enterprise fourteen, so that each holder of a share would contribute in the ultimate $200 only, and that the papers were not so signed; (c) The evidence is likewise undisputed that while the notes were sold to appellants before due they were bankers, and instead of parting with the agreed consideration at the time of the purchase it was placed to the credit of the sellers in an account at such bank subject to check, and there was no proof that the amount thereof, or any of it, was checked out before the commencement of the action.

The first ground requires but a passing notice. There was no claim in the complaint that the contract of purchase was rescinded for misrepresentation or otherwise. The defense was not based on rescission, nor was any claim made for damages because of the horse not being as represented, nor were any damages proved. So no feature of the complaint on that score should have been treated as of importance in submitting the cause to the jury, or in determining after verdict the proper judgment to be rendered.

In deciding the question of whether error was committed in holding that the evidence conclusively established an understanding between appellants' agent, who took the notes, and respondents that fourteen share-takers, including Otto Jahnke and R. J. Hall, should sign the notes before they should be regarded as binding, the rule must be applied that the decision of the trial court on such a subject must prevail on appeal,

unless it clearly appears to be wrong. There is no room for reasonable controversy but that the plan for selling the horse, well understood by every one who participated in the enterprise, was that there should be takers of fourteen shares at $200 each and that such number, as was supposed by those who participated, was secured and that it included Jahnke and Hall. The bill of sale of the horse was made to the fourteen persons by name. There was an express promise made to a large proportion of the signers, individually, that unless the whole number signed "the note should be no good," as some of the witnesses expressed it, or "there would be no sale," according to the expressions of others, or "the note would be no good or void," as was said by others.

Expressions of the sort indicated were made to at least seven of the signers. Further, by the uncontradicted evidence, at a meeting of share-takers, when nine were present and several signed the notes, the promise was made that there should be no sale unless the full number of signers was obtained. Two of those to whom a similar promise was individually made were not at the meeting, so there were eleven of the twelve signers who received the pledge. All were told that there were to be fourteen signers.

Such are our conclusions, from a careful study of the record. It seems sufficient to state them without referring to the evidence in detail. True, as counsel for appellants contend, the answers on this point were to the effect that the understanding was that Jahnke and Hall should sign to make up the full number of share-takers, and several of the witnesses who testified to the promise being made that there should be such full number did not claim that the names of Jahnke and Hall were mentioned, but the record shows that they were recognized as share-takers in the bill of sale, and, therefore, it must have been understood by all that they were to sign the notes. But let that be as it may, the real substance of the defense pleaded on this branch of the case is that it was

represented to those who signed the notes, as an inducement for them to do so, that there were to be takers of the full fourteen shares at $200 per share, and that fourteen persons should sign the papers, or that they should not take effect as binding obligations. On all the evidence, direct and circumstantial, standing as it does entirely uncontradicted, we do not see any warrant for holding that the trial court was clearly wrong at this point. The concluding act of giving the bill of sale with the fourteen names therein as vendees together with the other evidence would seem to leave no reasonable doubt on the question. That bill of sale is as follows:

"Know all men by these presents: That we have this day sold to *W. H. Dunn, A. P. Lark, Bert Engel,* Otto Jahnke, *John Heitman, Herman Frank, Jas. A. White, Clarence Fayerweather, Andrew Lark, J. O. Stranberg, John Smith, V. Brownlee, Oscar Anderson,* R. J. Hall, the imported Belgian stallion named Vigilant 1143 (21,674) in consideration of the sum of $2,800, receipt whereof is hereby acknowledged."

That bears date three days after the date of the note. It appears that the persons who failed to sign the notes signed a preliminary agreement to become parties thereto.

If we were to hold that the evidence does not conclusively show that all who signed the papers did so relying on an understanding that they should not be binding until the full number signed, still the situation would remain that many did sign with such understanding, and that those who did not, joined without knowing that their co-signers were only conditional makers. As to the latter the conclusion seems irresistible that they were induced to become parties to the notes by fraud. The natural, the necessary, inference one would draw upon unconditionally signing a note previously signed by others and to be still further signed, if not informed to the contrary, would be that all are to be equally bound, especially when the notes are in a form creating a joint and several liability. A person securing such unconditional signatures and

keeping silent in respect thereto while inducing others to sign would be guilty of perpetrating a fraud upon the latter. Therefore, in any event, all of the defendants had a good defense to the notes so long as they remained in the hands of the first holders. *Luetzke v. Roberts, ante,* p. 97, 109 N. W. 949.

It is familiar law, notwithstanding some conflict in the authorities, that a person may manually deliver an instrument, though it be in the form of commercial paper, to another, on its face containing a binding obligation *in præsenti* of such person to such other, with a contemporaneous verbal agreement that it shall not take effect until the happening of some specified event, and that the paper as between the parties will have no validity as a binding contract till the condition shall have been satisfied; and that proof of such condition does not violate the rule that a written instrument cannot be varied by a contemporaneous parol agreement; that such evidence only goes to show that the instrument never had vitality as a contract. *Nutting v. Minn. F. Ins. Co.* 98 Wis. 26, 73 N. W. 432; *Thorne v. Ætna Ins. Co.* 102 Wis. 593, 78 N. W. 920; *State ex rel. Jones v. Ch. of Comm.* 121 Wis. 110, 98 N. W. 930; *Golden v. Meier,* 129 Wis. 14, 107 N. W. 27; *Ware v. Smith,* 62 Iowa, 159, 17 N. W. 459; *Belleville Sav. Bank v. Bornman,* 124 Ill. 200, 16 N. E. 210; *Merchants' Exch. Bank v. Luckow,* 37 Minn. 542, 35 N. W. 434; *Burke v. Dulaney,* 153 U. S. 228, 14 Sup. Ct. 816.

The authorities are not all in harmony with the foregoing. *Dodd v. Dunne,* 71 Wis. 578, 37 N. W. 430, is an example, but by the Negotiable Instrument Law, sec. 1675—16, ch. 356, Laws of 1899, the principle thereof was incorporated into the written law of this state in these words:

"Every contract on a negotiable instrument is incomplete and revocable until delivery of the instrument for the purpose of giving effect thereto. As between immediate parties, and as regards a remote party other than a holder in due course,

the delivery, in order to be effectual, must be made either by or under the authority of the party making, drawing, accepting, or indorsing, as the case may be; and in such case the delivery may be shown to have been conditional, or for a special purpose only, and not for the purpose of transferring the property in the instrument. But where the instrument is in the hands of a holder in due course, a valid delivery thereof by all parties prior to him so as to make them liable to him is conclusively presumed."

The next important question is: Did appellants become the owners of the notes in due course? We need not discuss the subject, at any considerable length, of what constitutes a holder of commercial paper in due course, since the written law covers the matter. Sec. 1676—22 of the Negotiable Instrument statute provides that:

"A holder in due course is a holder who has taken the instrument under the following conditions:

"1. That it is complete and regular upon its face.

"2. That he became the holder of it before it was overdue, and without notice that it had been previously dishonored, if such was the fact.

"3. That he took it in good faith and for value.

"4. That at the time it was negotiated to him he had no notice of any infirmity in the instrument or defect in the title of the person negotiating it.

"5. That he took it in the usual course of business."

It will be observed that, in harmony with elementary principles, one of the important incidents of the transfer of negotiable paper, essential to the transferee becoming a holder in due course, is the actual payment therefor. So what constitutes payment, when there is not an actual transition of the money equivalent from the purchaser of the paper to the seller at the time of the transfer, has often been a subject of consideration. Such circumstances as we have here, that is the sale of a note before due and placing the consideration to the credit of the vendor upon the books of the purchaser subject to the former's check, have been held not to be a taking for

value so as to render the new holder a purchaser in due course, except to the extent of the money actually drawn and charged against such credit. This court so held in *Manufacturers' Nat. Bank v. Newell,* 71 Wis. 309, 37 N. W. 420. The principle there and in many cases declared was incorporated into the Negotiable Instrument Law at sec. 1676—24 in these words:

"Where the transferee receives notice of any infirmity in the instrument or defect in the title of the person negotiating the same before he has paid therefor the full amount agreed to be paid he will be deemed a holder in due course only to the extent of the amount theretofore paid by him."

Since in this case the evidence conclusively shows that when appellants took the notes from the original holder they placed the consideration to the credit of the latter, and there is no proof that the credit was thereafter exhausted in whole or in part by payment of money on account thereof, there was a failure of proof that appellants became holders of the papers in due course so as to cure the infirmities therein, unless the mere production thereof was sufficient to make out a *prima facie* case in that regard. On that the learned trial court decided in the negative, and seems in so doing to have followed the written law, as indicated by sec. 1676—25 of the Negotiable Instrument Law, which covers the subject in these words:

"The title of a person who negotiates an instrument is defective within the meaning of this act when he obtains the instrument, or any signature thereto, by fraud, . . . or when he negotiates it in breach of faith, or under such circumstances as amount to a fraud."

So as we have seen the title of the original holders of the papers in question was defective. They negotiated such papers in bad faith as to all who signed conditionally, and as to others, if any there were, their signatures were obtained by fraud. The purchaser of commercial paper under such circumstances occupies a materially different position, when he

attempts to judicially enforce it, from that occupied by one who has taken a note as indorsee, which in the hands of the original holder is subject to a defense not based on the title of the latter being defective or his signature having been obtained by fraud. Ordinarily the second holder is presumed, in the absence of evidence to the contrary, to have taken the paper in due course and before maturity. But the rule in this state and generally, independent of the written law, is that where circumstances exist rendering the title of the original holder defective, or showing fraud in obtaining the paper, the burden is on the second holder to go further than to merely produce such paper. He cannot rely upon the mere presumption which obtains, generally, but must carry the burden of showing that he is a holder in due course by proving facts sufficient to establish it. *Fuller v. Green,* 64 Wis. 159, 24 N. W. 907.

The reason for the foregoing rule, as indicated by judicial authorities, is fairly stated in 4 Am. & Eng. Ency. of Law (2d ed.) at page 323, to the effect that proof of fraud suggests that the party thereto who formerly held the paper and is precluded from recovering thereon himself, transferred it to another to recover for his use, and the latter must overcome the presumption in that regard. It is further said there with supporting authorities:

"It is well settled that the holder does not meet the burden cast upon him by proof of value merely, but he must also prove . . . that he gave value within the conditions which the law prescribes to establish the character of a *bona fide* holder; or, as it is sometimes expressed, he must show all the circumstances under which he took the paper, with a view to determining his good faith as a holder." "But . . . it has been held that proof that the holder before maturity paid full value for the instrument sued upon" makes out a *prima facie* case of *"bona fides."* *Market & F. Nat. Bank v. Sargeant,* 85 Me. 349, 27 Atl. 192; *Henry v. Sneed,* 99 Mo. 407, 422, 12 S. W. 663.

That seems reasonable and we adopt it, although it is not universally supported by judicial authority. Of course, proof of payment is not conclusive, it only makes out, as indicated, a *prima facie* case; one subject to be rebutted by the adverse party. The basic principle of the law, as thus declared by the courts, was incorporated into the Negotiable Instrument Law at sec. 1676—29, in these words:

"Every holder is deemed *prima facie* to be a holder in due course; but when it is shown that the title of any person who has negotiated the instrument was defective, the burden is on the holder to prove that he or some person under whom he claims acquired the title as a holder in due course."

Counsel for appellants freely concede that the mere crediting of the consideration agreed upon, to the seller of commercial paper, as was done in this case, does not constitute payment therefor, but it is insisted that the burden in such circumstances is on the respondent to show that the credit was not balanced by payment. Not only the judicial authorities, as we have seen, are to the contrary, but the written law is also. Counsel rely confidently on *Warman v. First Nat. Bank,* 185 Ill. 60, 57 N. E. 6, but as we read that case it does not bear out counsel's contention. The note there dealt with was subject in the hands of the original holder to an ordinary defense, not one based on the title of such holder being defective, or on fraud in obtaining the paper, and so governed by the principle incorporated into sec. 1676—29 of the Negotiable Instrument statute.

What has been said renders all other questions discussed in the briefs of counsel immaterial. The conclusion reached by the learned circuit court that the title of the original holders of the notes was defective and that such condition cast upon the appellants the burden of proving that they became holders of the papers in due course, which included proof that they actually paid therefor, not merely entered upon the bank books a credit for the agreed consideration, and that, there being

no proof produced on that subject, the evidence failed to establish the causes of action pleaded, seems to be fully warranted.

By the Court.—The judgment is affirmed.

AMERICAN FOUNDRY AND FURNACE COMPANY, Appellant, vs. SETTERGREN and another, Respondents.

December 5, 1906—January 8, 1907.

Sales: Offer to accept return of goods: Failure to return: Remedy of seller: Consideration: Breach of contract: Damages: Appeal and error: Conflict of evidence: Findings: Market value: Witnesses: Competency.

1. A buyer, having received goods ordered accompanied by an invoice, objected to the price and sent his check to the seller for the amount he claimed to be a fair price. The seller immediately replied insisting on the price named in the invoice, but gave the buyer the option to keep the goods at the demanded price or to redeliver the goods to the seller at once. The buyer thereupon requested the return of his check, which was returned, but failed to redeliver the goods. *Held:*

   (1) The return of the check was a sufficient consideration for the promise of the buyer to redeliver the goods.

   (2) The inconsistent conduct of the buyer in retaining and using the goods gave the seller the right to elect to hold the buyer on an implied contract to pay the demanded price, or to stand on the contract to return the goods and to recover its damages instead of the demanded price.
2. In such case, the seller having elected to stand on the contract to return the goods, its damages, in the absence of peculiar circumstances, were the market value of the goods.
3. In such case the election of the seller opens the door to the buyer to offer proof in negation of the damages claimed, and, there being conflict of evidence upon that subject, it was *held* that the verdict of the jury could not be set aside on appeal.
4. Where a witness, called to prove market values, appears sufficiently familiar in general with that subject to arouse the judicial duty of the trial court to decide as to his qualifications, the decision of that court will be affirmed unless clearly wrong.

APPEAL from a judgment of the circuit court for Sauk county: E. RAY STEVENS, Circuit Judge. *Affirmed.*

Defendants, local hardware dealers, ordered from the Ruttan Manufacturing Company certain bar grates for one of their furnaces in use in a school building at Baraboo. They received from the plaintiff such grates, which were turned over to the school officers and put into the furnace. A few days later defendants received from the plaintiff a bill of $45 for the grates, with the explanation that the plaintiff was the successor to the business of the Ruttan Manufacturing Company. Defendants objected to the price, and sent their check for $21.37, which they claimed to be fair. Plaintiff immediately replied that the manufacturers had raised price of these grates, and they could not be obtained for less, but gave defendants the choice to retain the goods and pay the price of $45 for same, or to return them to the shipper at once. To this proposition the defendants replied November 14, 1902, by letter, that, upon return of their check, the goods would be returned at once, as per instruction. The check was sent them. Upon a later inquiry defendants wrote, December 11th, "the furnace repairs that you refer to have been returned, as per instructions;" but, as matter of fact, they never did return them, and they remained in the school furnace permanently. About December 31st a set of castings was made by a local foundryman from those grates as patterns, and those castings were sent in pretended return of the grates, but were refused. The complaint, after amendment in circuit court, declared that prior to November 14th defendants were in possession of these goods received from plaintiff; that on that date defendants agreed with plaintiff that they would return and redeliver said goods, but that they had wholly failed and neglected so to do, and thereby plaintiff had suffered damage in the sum of $60, together with interest on $45 from November 14th, for which amounts judgment was prayed. The foregoing facts were established without controversy, ex-

cept as to the damages. Upon the trial but one issue was submitted to the jury, namely, the reasonable value of the property in question in October, 1902, which was answered by the jury to be $20.62. The defendants, before suit, having tendered $26.25, and maintained the tender by delivering it into court, the judgment directed that such sum of $26.25 be turned over to plaintiff, and that defendants recover judgment for costs. From this judgment the plaintiff appeals.

For the appellant there was a brief by *Bentley & Kelley* and *F. C. Eschweiler,* and oral argument by *F. R. Bentley.*

For the respondents there was a brief by *Grotophorst, Evans & Thomas,* and oral argument by *Evan A. Evans.*

DODGE, J. It can hardly be doubted that the defendants, by promising upon sufficient consideration, namely, the return of their check, to redeliver the property in question, and by their inconsistent conduct in retaining and using the grates after notice to them that they could do so only upon payment of the price of $45, gave to the plaintiff the right to elect to hold them to either of two contracts. By their retention of the grates after such notification they had doubtless so acted as to give plaintiff a right to insist on an implied contract to pay therefor $45 (*Wellauer v. Fellows,* 48 Wis. 105, 4 N. W. 114); but by previously promising, for a consideration, to return the grates, they had entered into another contract upon which plaintiff might also rely. If it elected the former, plaintiff could recover only the agreed price of $45. If, however, relying on their promise to return the grates, plaintiff had, within reasonable anticipation of the parties, entered into new engagements with reference thereto, or otherwise changed its situation, its damages might exceed that sum, and such damages it would be entitled to recover. It also, in such case, might be able to prove that the price named for such grates was less than their real value, and that the failure to return them to it had caused damage to such full value. In

this situation the plaintiff elected to stand upon the contract to return the goods and to recover its damages instead of the agreed price, and alleged such damages to be $60 and some interest instead of $45 and interest, which must have measured its recovery had it elected otherwise. There is no ambiguity in the grounds on which the plaintiff stands in this action. It is the recovery of the damages suffered by it from breach of the contract to return. Ordinarily, and in the absence of peculiar circumstances, the damages resulting from the failure to deliver an article of merchandise is the reasonable market value thereof, upon the assumption that the plaintiff could have supplied himself with the same articles by paying such reasonable market value. Of course, this amount might be enhanced by special circumstances, such as necessity of expense or delay and consequent loss of profit, if such could be proved and were within the reasonable anticipation of the parties. *Kelley, M. & Co. v. La Crosse C. Co.* 120 Wis. 84, 97 N. W. 674. Had the plaintiff been able to satisfy the jury that the market conditions with reference to these particular articles were such that it could not supply itself with like property for less than $45, or even for less than the $60 claimed, its recovery might have extended to such sum, but it had, of course, opened the door to the defendants to offer proof in negation of any such amount of damages, and, to that end, to call witnesses as to the market value. In other words, plaintiff, in seeking to enhance its recovery above the price which had been agreed upon, opened the door to proof that its damages from nonreturn were really less than that price, as indeed they were if it could have obtained a new supply of such grates without expense or other injury at less than $45. Hence we can see no escape from the conclusion that the evidence as to reasonable value was admissible, nor, since there was conflict of evidence upon the subject, that the verdict of the jury cannot be set aside upon appeal.

The overruling of plaintiff's objection to qualification of

defendants' witnesses to testify as to market values we do not think presents error. Sufficient familiarity in general with the subject of market values of such property was shown to arouse the judicial duty of the trial court to decide as to such qualification, and we cannot say that his decision is so clearly wrong that it can be held erroneous upon appeal, under the rule so often announced as to the weight to be given to the decision of the trial court as to competency of witnesses or other forms of evidence. *Hupfer v. Nat. D. Co.* 119 Wis. 417, 427, 96 N. W. 809.

By the Court.—Judgment affirmed.

CARLON, Appellant, vs. TOWN OF GREENFIELD, Respondent.

December 6, 1906—January 8, 1907.

Highways: Insufficiency: Personal injuries: Frightening horses: Reception of evidence: Appeal and error: Direction of verdict.

1. In an action for injuries caused by a horse taking fright at material placed in a highway, the plaintiff is not prejudiced by the admission of evidence offered by defendant showing the purpose for which the material was placed in the highway, where the complaint alleged that it was so placed for use in repairing a culvert in the highway, although the answer did not allege it was placed there for that purpose.
2. In such case, were the complaint silent on the subject, such evidence would only be proper if the defendant had alleged such fact to show that the use of the highway for such deposit was within recognized exceptions to the general rule requiring highways to be kept free from obstructions tending to make them unsafe for public travel.
3. In an action for injuries caused by material deposited in a highway by a contractor engaged to repair a culvert, it appeared that the material consisted of boards, planks, barrels, and a mortar box with a coating of dry white material, placed on top of the other material so as to elevate it about three feet, all placed within about two feet of the traveled track. It also

appeared that the material could readily have been placed along the margin of the highway, near a fence, some twenty feet distant from the traveled track. *Held*, that it was error to direct a verdict for the defendant.

4. In such case the ruling was *held* unobjectionable so far as it related to the length of time the material had been left in the highway, the manner of piling the material, and the leaving of it without a lantern or other signal to apprise travelers of its presence and location in the road, but erroneous in that it did not submit to the jury the question whether the box and other material was unnecessarily dangerously near the traveled track of the highway, making it defective for public travel.

APPEAL from a judgment of the circuit court for Sauk county: E. RAY STEVENS, Circuit Judge. *Reversed.*

Plaintiff brought an action to recover damages for injuries to his person and property which he alleges were caused by the negligence of the defendant. The defendant interposed a general denial. The complaint alleges that the defendant caused material used for the repair of culverts on the highway to be deposited in a negligent manner near the place of the accident, that the damages sustained by him were attributable thereto, and that he was without fault. The evidentiary facts are that the plaintiff with his cousin, a young man, drove over the highway at about 11:30 o'clock in the evening of May 17, 1903. The highway runs east from the city of Baraboo. They drove one horse hitched to a top buggy. The horse seems to have been of a gentle disposition. They drove over the road in the early part of the evening in going to the city of Baraboo, and were returning over the road when the accident occurred. A Mr. Lusby and his brother had been engaged by the defendant town to repair culverts on this highway, and on the Friday preceding the accident they had deposited boards, barrels, and a mortar box in this road near a culvert and next to the traveled portion of the road. The mortar box was placed on top of the other material, all of which lay somewhat irregularly. The box was about three feet above the surface of the ground and about two feet from

the margin of the level embankment which formed the traveled track. The embankment at this point was about three feet high, from twenty-two to twenty-five feet wide, and level, so that it was fit for travel throughout its whole width. The place where the material was deposited was overgrown with weeds, which somewhat obscured it. There was no signal to give warning to travelers. The distance from the embankment to the north fence of the highway is said to be about twenty feet. This space is fairly level and passable with a vehicle loaded with such material as the Lusbys placed near the traveled track. When plaintiff approached the pile of material from the west over the culvert his horse shied, going toward the south, tipped the buggy, and thus broke parts of the buggy and harness and injured plaintiff. Upon all the evidence the court directed the jury to find a judgment for the defendant, and awarded judgment accordingly. This is an appeal from such judgment.

For the appellant there was a brief by *Grotophorst, Evans & Thomas,* and oral argument by *Evan A. Evans.*

For the respondent there was a brief by *Dithmar & Carow,* and oral argument by *J. W. Carow.*

SIEBECKER, J. The reception of defendant's evidence showing the purpose for which the material was placed in the highway at the point of accident was not erroneous under the pleading. The complaint alleges that the defendant town had placed this material at this place for the purpose of using it to repair the culverts in the highway. In view of this allegation, though the answer did not allege that it was placed there for this purpose, the plaintiff could not be prejudiced by the reception of evidence showing the same fact. Were the complaint silent on the subject, then such evidence would only be proper if defendant had alleged such fact to show that the use of the road for the deposit of such material was within the recognized exception to the general rule which requires that

the highway be kept free from obstructions tending to make it unsafe for public travel. This fact standing admitted in the complaint, there is no necessity for pleading it specially in defense. The plaintiff concedes that material used in repairing highways may be deposited in it, but avers that the municipal authorities must exercise reasonable care to avoid placing it in such a way as to make the highway dangerous to public travel. The court held, under the facts and circumstances adduced, that the material was properly in the highway, and was so located and deposited as not to constitute a defect. In respect to the length of time it was left in the road, the manner of piling the material, and leaving it without a lantern or other signal to apprise travelers of its presence and location in the road, the ruling was unobjectionable. In these respects the conduct of the town officers cannot be said to have been wanting in due care under the facts proven. But the main ground relied on by plaintiff to show defendant's liability is the alleged dangerous proximity of the material to the traveled track of the road. It is undisputed that the material deposited consisted of boards, planks, barrels, and a mortar box with a coating of dry white matter; that this box was placed on top of the other material so as to elevate it about three feet; that it was about two feet from the margin of the traveled track, and that it could readily have been placed along the margin of the road, near the fence, some twenty feet distant from the traveled track. It has been held that such an object within the limits of a highway may naturally tend to frighten horses of ordinary gentleness and thus render the highway an insufficient and defective one under the statute. *Foshay v. Glen Haven,* 25 Wis. 288; *Loberg v. Amherst,* 87 Wis. 634, 58 N. W. 1048; *Laird v. Otsego,* 90 Wis. 25, 62 N. W. 1042. The question, then, is whether the box and other material was unnecessarily dangerously near the traveled track of the highway, making it a defective one for public travel. True, the material was left in this place for

the purpose of repairing the culverts of the road; still, as above stated, in so depositing it the town officials and its agents were required to exercise reasonable care in selecting a place least calculated to frighten ordinarily gentle horses in the use of the road. Would ordinarily gentle horses be less likely to become frightened by this object had the material been placed near the north limits of the road, or would another locality in the immediate vicinity have been less dangerous in this respect? These questions are pertinent inquiries under plaintiff's claim. We are unable to say that the answer is so plain and obvious that it can be held, as matter of law, that the persons who deposited this material in the place designated exercised reasonable care for the safety of travelers carefully using the highway. Might the jury have found, under the facts adduced, that, if this material had been further removed from the traveled track, or had been deposited in another place within the limits of the highway in the immediate vicinity, it would not have been a dangerous object in the road, and that it was such an object where it was located? If so, then it must follow that the conduct of the agents of the town in improperly depositing this material in the highway made it dangerous to travel and rendered the road insufficient and defective in law. In view of these considerations these questions should have been submitted for determination to the jury. *Cairncross v. Pewaukee,* 78 Wis. 66, 47 N. W. 13; *Bloor v. Delafield,* 69 Wis. 273, 34 N. W. 115.

The facts bearing upon plaintiff's want of care do not sustain defendant's contention that he must be held guilty of contributory negligence as a matter of law. The facts and circumstances were such that his care or want of care was an inference upon which a jury should pass.

The exception urged to the court's ruling excluding the inquiry whether the town, in fact, rebuilt the culvert near the place where the accident occurred may not arise upon another

trial, but we are unable to perceive why the court excluded this evidence. Whether or not this material was left for the purpose of repairing this culvert could properly have been considered by the jury in connection with all the facts and circumstances in passing upon the issues involved.

By the Court.—Judgment reversed, and the cause remanded for a new trial.

DRALLE, Appellant, vs. TOWN OF REEDSBURG, Respondent.

December 6, 1906—January 8, 1907.

Highways: Defects: Personal injuries: Negligence: Contributory negligence: Evidence: Direction of verdict.

1. In an action to recover for personal injuries from a defective highway, the evidence, stated in the opinion, is *held* sufficient to support a finding that the highway was defective and unsafe and that the defendant town was negligent in so maintaining it.
2. In such action the fact that the plaintiff knew of the defective condition of the highway is *held* insufficient as a matter of law to bar a recovery.
3. In such action the question whether the plaintiff was exercising such care as persons of common and reasonable prudence would ordinarily exercise under the circumstances shown by the evidence is *held* to be a question for the jury.
4. In such case it was error to direct a verdict for the defendant.

APPEAL from a judgment of the circuit court for Sauk county: E. RAY STEVENS, Circuit Judge. *Reversed.*

This action was brought by the appellant against the respondent town of *Reedsburg,* Sauk county, Wisconsin, to recover for personal injuries sustained by her on account of an alleged defective highway in said respondent town. The appellant had resided in said town for about eleven years prior to the time of injury, and was accustomed to riding over the highway in question. The defect complained of

consisted of a large sand rock extending across the highway. Appellant at the time of injury was riding over the highway upon a load of potatoes, and claims to have been thrown therefrom by a jolt occasioned by the wheels of the wagon striking the rock in the highway. It is alleged in the complaint that the highway runs north and south; that the defective condition was a few rods north of where the road leading from Lime Ridge joins the highway, running north from Loganville to Reedsburg; that the highway is extensively used; that said highway was laid out on land that is rolling and which slopes to the south, and that underneath and at the surface there exists a great deal of sand rock, from which the water had washed the dirt for a considerable distance and carried it down the hill; that running across said highway at this point is a large sand rock which extends across the entire portion of the highway used for travel; that at either end, either as a part of the rock or as a second large sand rock, towards the south and east on one side and towards the south and west on the other, there were large sand rocks; that said rocks were large and the rain and water washed the dirt away, leaving a depression of from twelve to fifteen inches and running back from said center rock southerly a distance of from fifteen to eighteen feet; that it is impossible to drive on either side of this portion of said road or that portion usually taken in driving because of the existence of said rocks; that in traveling over said highway in going from south to north it is necessary to drive over this portion of the highway that had been partially washed out; and that said highway in consequence thereof was insufficient, defective, unsafe, and dangerous for public travel, and had so existed for several months prior to the injury.

The answer admits the residence of the appellant, and that the place where the injury occurred is a public highway, and denies the other material allegations of the complaint, and alleges that the injuries alleged to have been received by appellant were caused, if at all, by her own negligence. It

is conceded that notice of the injuries was served upon the respondent as required by law, and that the appellant's claim was duly filed with the respondent town and its proper officers in manner prescribed by law, and that said respondent refused to allow said claim or any part thereof. The case was tried by the court and a jury, and after the evidence was in the court directed a verdict in favor of defendant on the ground that plaintiff was guilty of contributory negligence. On direction of the court the jury returned a verdict for defendant, to which plaintiff duly excepted, and from judgment in favor of defendant this appeal was taken.

For the appellant there was a brief by *Grotophorst, Evans & Thomas,* and oral argument by *Evan A. Evans.*

For the respondent there was a brief by *E. C. Gottry,* attorney, and *Daniel H. Grady,* of counsel, and oral argument by *Mr. Grady.*

KERWIN, J. It is insisted on the part of the appellant that the court erred in directing a verdict for the respondent. This contention involves the negligence of the respondent and the contributory negligence of the appellant.

1. The place where the injury occurred was a public highway under the control of the respondent, much used for public travel, and the first question presented is whether such highway was defective at the place where the injury complained of was received. If the highway in question was defective, there is no doubt but that there was sufficient evidence of notice to the respondent. In respect to the defective condition of the highway, the evidence tends to show that there was a solid ledge of rock extending across the traveled track of the highway, on such an angle as to cause one wheel of a wagon to strike it first; that the roadway was narrow so that it was difficult, if not impossible, to turn out and avoid the rock; that the rock stood up perpendicular with the roadbed, did not slant, and was from four to ten inches high; that the rock ran clear across the traveled track and into the hill.

One witness testified that the rock stuck up out of the ground from eight to ten inches, and that there was no way to turn out in order to avoid it. Appellant testified that, when one wheel struck the rock, it gave such a jerk that she was thrown out of the wagon. We think it clear that there was sufficient evidence to support a finding of the jury that the highway was defective and unsafe, and that respondent was negligent in so maintaining it. *Hebbe v. Maple Creek,* 121 Wis. 668, 99 N. W. 442; *Wheeler v. Westport,* 30 Wis. 392.

2. The important question in the case is whether the appellant was guilty of contributory negligence as a matter of law. If not, the court erred in taking the case from the jury and directing a verdict for respondent. There is evidence that appellant traveled over this highway, both by team and on foot, for several months prior to the injury, during which time it was in substantially the same condition as at the time of the injury. It also appears that this highway had been much traveled by the public continuously up to the time of the injury. It also appears from the evidence that appellant had ridden safely over it on a load of potatoes before the time of the injury, but she did not know whether she occupied the same position as at the time of the injury. She went "lots of times" on a load with the same team and driver. When she fell off she was riding in a lumber wagon, which had a double box piled even full with sacks of potatoes, the sack upon which she was sitting a little higher up, but the whole sack not above the rest, just a part of it where she sat, with another sack to her back and one which she braced her feet against. She was seated in this position in the middle of the wagon when the wheel struck the rock and she was thrown from the wagon and injured. Appellant testified that when her husband, who was driving, approached the rock he drove slower; "he drove real slow, real careful. I hung tighter all I could and braced myself;" that when the wheel struck the rock it gave such a jerk that her hold was torn away and she was thrown out of the wagon. It is insisted by counsel for re-

spondent that appellant assumed a dangerous position knowing the condition of the road, and that had she been sitting in front where she could have seen when the wheel would come in contact with the rock, or had her arms or limbs been free, she would not have been injured. But there is evidence that the position of appellant on the load was a reasonably safe one. She sat in the middle of the wagon with a bag filled with potatoes to support her back and one to brace her feet against, and her husband driving very slowly and carefully at the time of injury, and she holding onto the sack with both hands, and it does not appear that her arms or limbs were not free. True, appellant testified that she was clothed warmly, had her winter cape on and was wrapped in a blanket, but that her feet were not wrapped up in the blanket, but she had it over her lap. She had her feet braced against the sack and was holding on with her hands.

We are cited to *Nicks v. Marshall,* 24 Wis. 139, on the point that appellant was guilty of contributory negligence in taking a dangerous position on the wagon. But in that case it appeared clearly that the plaintiff assumed a dangerous position upon an unbound load of hay thrown loosely on the wagon box, being on the hind end on his knees facing the rear of the wagon, and the court said, if he had been riding with his face in the direction the team was traveling, "he would have been likely to see the rock in the highway and that the wheel would probably strike it, and thus have been prepared for the 'severe jolt' of the wagon when it passed over the obstruction." So it appears that the case cited is not controlling. The fact that appellant knew of the defective condition of the highway in the case before us was not sufficient as a matter of law to bar recovery. *Kelley v. Fond du Lac,* 31 Wis. 179; *Gerrard v. La Crosse C. R. Co.* 113 Wis. 258, 89 N. W. 125. True, as said by this court in *Gerrard v. La Crosse C. R. Co., supra:*

"The defect may be so serious or dangerous that a court would be justified in saying that any attempt to proceed would

be negligence, but in all other cases the question is whether a reasonably prudent man, exercising ordinary care, would attempt to proceed under the circumstances, and, if so, whether the plaintiff used that additional care which such a man would exercise in view of his knowledge of the danger."

In the case before us the highway was in constant use by the public, and it cannot be said upon the evidence produced as a matter of law that it was so imminently dangerous as to make any attempt to pass over it negligence. If the appellant was exercising such care as persons of common and reasonable prudence would ordinarily exercise under such circumstances, she was not guilty of negligence. Whether she was or not, was, we think, a question for the jury. *Nelson v. Shaw,* 102 Wis. 274, 78 N. W. 417.

It follows that there was sufficient evidence to send the case to the jury on the negligence of respondent and the contributory negligence of appellant, and therefore the court below erred in directing a verdict for the respondent.

By the Court.—The judgment of the court below is reversed, and the cause remanded for a new trial.

SEBRANKE, Respondent, vs. KOHLMEYER, Appellant.

December 6, 1906—January 8, 1907.

Waters and watercourses: Mill ponds: Obstructions: Evidence: Injunction.

In an action to compel the removal of an obstruction placed in a mill pond, the complaint alleged facts sufficient, if true, to entitle plaintiff to an injunction perpetually forbidding defendant from erecting or maintaining, within the flowage created by the dam, obstructions of any kind or description, and the evidence, stated in the opinion, is *held* sufficient to sustain findings in favor of plaintiff.

APPEAL from a judgment of the circuit court for Sauk county: E. RAY STEVENS, Circuit Judge. *Affirmed.*

This action was commenced February 9, 1905, to compel the defendant to remove from the plaintiff's mill pond the structure and sewer described in the complaint, and to perpetually enjoin the defendant from erecting or maintaining within the limits of the flowage created by the dam any obstruction of any kind or description, and for damages and costs. The complaint alleged facts sufficient, if true, to entitle the plaintiff to such injunction. February 28, 1905, the defendant answered by way of admissions, denials, and counter allegations. The case came on for trial April 24, 1905, and, after the close of the trial, the court made findings of fact wherein it is found, in effect, that the plaintiff was the owner in fee of the premises described in the complaint and of the milldam, water power, and rights of flowage appurtenant thereto; that such dam had been established and maintained on said premises at the same height and to the same extent as at the commencement of the action for more than thirty years immediately prior thereto, without interruption and under claim of right by the plaintiff and his grantors, and they had thereby acquired and owned at the time of the commencement of this action the right to flow over all lands covered by the mill pond created by said dam; that the defendant owned and occupied lands adjoining said pond upon the south; that opposite said lands of the defendant and extending northerly into said pond and nearly at right angles to the stream, without permission or authority from the plaintiff, entirely within the limits of such flowage belonging to the plaintiff, the defendant built a board and post structure described as follows: 2x4-inch posts driven eighteen to twenty-four inches into the bottom of the pond and about two feet apart, extending in two lines about eight feet apart, forty feet within the limits of said flowage right of the plaintiff, and a like row of posts across the north end of such structure; that upon these posts the defendant securely nailed boards eight to ten inches wide, placed closely

together, extending nearly to the bottom of the pond and above the surface of the pond sixteen or eighteen inches, and within the inclosure formed by the structure the defendant placed sawdust and other refuse; that the said milldam consisted of the flume and gates leading to the plaintiff's mill, and waste gate fourteen feet wide, and west of that an overflow dam constructed of piling bolted together, plank apron extending under the pond to the south end of earth and rock; that the whole of said overflow dam was ninety to one hundred feet in length, and west of said overflow dam was an earthen dike, constituting a part of the dam, from forty to fifty rods in length; that said earthen dam extended both to the west and east of said land of the defendant, which was situated upon the opposite or south bank of the stream and pond; that the said dam and waste gate were upon the north side of the stream and pond; that the entire width of the stream at the point where said structure was built was 130 feet, and the depth of the water at the ordinary stage not to exceed four feet at the deepest place; that the portion of the dam so constructed of earth was easily washed away by water flowing over it or by currents of water in the pond flowing against it; that the stream was subject to sudden rises of water and floods; that during such periods the water from the whole pond flowed toward the dam; that at such times there was a decided current over the place where the defendant built said structure; that at such times it was often necessary, in order to save the dam from overflow, to open the waste gates and permit the water to escape; that there was danger that such structure might be carried by the current down the pond and stop the passage of water through the waste gate and result in the destruction of the dam; that there was also danger, in case such structure should be washed away, of debris being carried into the flume and damaging the gates and wheel; that such structure was an obstruction to the flow of water in said pond in times of freshet; that it endangered

the dam, and that any such structure was an invasion of the plaintiff's rights of flowage and increased the danger of overflow in times of freshet and, consequently, injury and loss to the plaintiff; that the said dam and water power thereby created and appurtenant thereto was a valuable right and was found to be worth from $400 to $600 per year, and that the danger of injury to the plaintiff resulting from such structure recurred with each succeeding freshet. As conclusions of law the court found, in effect, that the plaintiff had no adequate remedy at law for the injuries mentioned; that the defendant should be ordered and required to remove said structure completely and entirely from said pond; that the defendant and all persons claiming under him be restrained and enjoined from erecting or maintaining any similar structure within the limits of said mill pond; that the plaintiff was entitled to taxable costs and disbursements in this action against the defendant; and ordered judgment to be entered accordingly. From the judgment so entered the defendant appeals.

G. Stevens, for the appellant.

James A. Stone, for the respondent.

CASSODAY, C. J. The defendant contends that the findings of the court are not sustained by competent testimony. To appreciate the evidence the situation as admitted should be kept in mind. The stream, at the place in question, runs in an easterly direction. The defendant's land, described, abuts upon the south shore of the pond, and the structure complained of extends from that shore north into the pond. The flume and gates leading to the plaintiff's mill, and the waste gate—together constituting the milldam proper, and mentioned in the foregoing statement—appear to have been situated about forty rods east of the defendant's structure in question. Immediately west of such waste gate and along and upon the north shore of the pond was an overflow dam,

constructed as described, from ninety to one hundred feet in length. Immediately west of such overflow dam and along and upon the north shore of the pond was an earthen dike, constituting a part of the dam, forty to fifty rods in length and extending further west than the defendant's structure in question. At the point where such structure was located the pond was only 130 feet wide and the water at an ordinary stage at no place more than four feet in depth. Such structure extended north nearly at right angles to the shore and the pond forty feet, and was eight feet wide and closely inclosed with boards nailed thereto and extending nearly to the bottom of the pond and from sixteen to eighteen inches above the surface of the pond. Such structure constituted a complete breakwater for nearly one third of the distance across the pond. Some distance west of such structure the course of the stream was from the southwest to the northeast into the head of the pond, and the water therein naturally moved toward the north shore of the pond and the dike mentioned, and so necessarily passed between the north end of such structure and the dike. At the time of the commencement of this action the plaintiff was the owner in fee of the mill, milldam, overflow dam, dike, water power, and all rights of flowage appurtenant thereto, and the same had been established and maintained upon said premises at the same height and to the same extent, without interruption, under claim of right by the plaintiff and his grantors, for more than thirty years. The complaint alleged, in effect, that said dike was easily damaged by extreme floods or any diversion of the current of the stream at times of high water, and that during the two years immediately preceding the commencement of this action, such dike, at a point nearly opposite the defendant's structure, had been washed out four times, so as to destroy its entire purpose as a dam. The answer admitted that the plaintiff's dam had been washed out and carried away by high water many times and was liable to be washed out and

carried away many more times in the future without fault of the defendant. The evidence covers nearly one hundred printed pages, of which sixty-nine pages are on the part of the plaintiff. The only objection to the ruling upon evidence urged is that one out of twelve of the plaintiff's witnesses, who had seen the water power in question but had never paid any particular attention to the pond or dam, was allowed to answer hypothetical questions in respect to the same as an expert. But it is enough here to say that the other evidence in the case, to which no objection was taken, is, in our judgment, sufficient to sustain the findings of the trial court. Certainly we cannot hold that such findings are against the clear preponderance of the evidence.

By the Court.—The judgment of the circuit court is affirmed.

STATE EX REL. MCKAY and another, Respondents, vs. CURTIS, Mayor, and others, Appellants.

December 6, 1906—January 8, 1907.

Mandamus: *Intoxicating liquors: Revocation of license:* Certiorari: *Adequate remedy: Statutes: Construction: "Order:" "Made pursuant to law:" Hearing before common council: Complaint: Defects: Waiver.*

1. It is the settled law of Wisconsin that *mandamus* will lie to compel the common council of a city to revoke a liquor license in a case where, upon complaint duly made, the facts requiring such revocation are established beyond dispute.
2. Although *certiorari* is a complete and adequate remedy for one who has been wrongfully deprived of his license, it is not a complete and adequate remedy where a common council dismisses proceedings for the revocation of a license when it should have revoked the license, since a judgment reversing that dismissal is barren of any substantial result except to remove a possible bar to the beginning of a new and independent proceeding for revocation.

3. Under sec. 1558, Stats. 1898 (providing that a license for the sale of intoxicating liquors may be revoked, among other things, for failure to observe "any *order* of such supervisors, trustees, aldermen, or county superintendent of the poor, or any of them, made pursuant to law"), the word "order" is a word of broad and general meaning, includes all commands, precepts, or rules made by competent authority, and hence includes an ordinance passed by the board of aldermen of a city which has been approved and published so as to become valid.
4. If such an ordinance is within the power of the common council it is an *order* "made pursuant to law."
5. A common council having duly enacted and published an ordinance prescribing the hours of closing and opening for saloons, complaint was made to the common council that a licensee was guilty of a violation of such ordinance. On the hearing the evidence clearly showed such violation, but the common council nevertheless refused to revoke such license. *Held*, that the action of the common council could be corrected and coerced by *mandamus*.
6. In such case the complaint was radically defective, in that it charged a sale of liquor after the prescribed hour of closing but failed to charge a sale thereafter and before the hour prescribed for opening. On the hearing before the common council no objection was made to the sufficiency of the complaint, and the answer and proofs showed a clear violation of the ordinance. *Held*, under the liberal rules of secs. 4658, 4659, 4706, Stats. 1898, requiring defects or imperfections in matters of form which do not tend to prejudice the defendant to be disregarded and permitting amendments, that a peremptory writ of *mandamus* requiring the common council to revoke the license was rightly ordered by the circuit court.

APPEAL from a judgment of the circuit court for Dane county: E. RAY STEVENS, Circuit Judge. *Affirmed.*

This is an appeal from a judgment against the mayor and common council of the city of Madison awarding a peremptory writ of *mandamus* directing them to revoke the retail liquor license of one Henry Niebuhr. The defendants made return to the alternative writ, taking issue with the recitals therein, and the issues were tried before the court and findings made in substance as follows:

(1) That the relators were residents and taxpayers of the

city of Madison, and that the defendant *Curtis* was the mayor and the remaining defendants the aldermen constituting the common council of said city.

(2) That an ordinance of said city, duly passed, provided, among other things, that all licensed saloonkeepers of said city should close or cause to be closed their respective places of business and exclude therefrom all customers, guests, and other persons at or before the hour of 12 o'clock midnight of each night and keep the same closed until 5 o'clock in the morning, under pain of a fine of not less than $25 nor more than $50 for each offense.

(3) That on July 23, 1905, Henry Niebuhr was a duly licensed saloonkeeper, conducting a saloon in said city at No. 1524 Williamson street.

(4) That on the 24th of July, 1905, complaint was duly made by the chief of police of said city to the municipal court of Dane county, charging that said Niebuhr on July 23, 1905, violated said ordinance in failing to keep his place of business closed between the hours of 12 o'clock midnight and 5 o'clock a. m., and that thereafter said Niebuhr was duly arrested, arraigned, and pleaded guilty to said complaint and was fined $25 and costs therefor.

(5) That thereafter, on August 22, 1905, the relator *Galpin* made complaint in writing under oath to said common council as follows:

"State of Wisconsin, County of Dane, City of Madison—ss.: The complaint of *F. T. Galpin,* complaining, shows to the mayor and common council of the city of Madison, Dane county, Wisconsin, that he is a resident, a taxpayer, and an elector in said city; that a license was heretofore granted to one Henry Niebuhr of said city of Madison to sell intoxicating liquors in said city; that, as this complainant is informed and believes and alleges the fact to be, the said Henry Niebuhr, on the 23d day of July, 1905, at the said city of Madison, and in the premises in which he was authorized by his said license to sell intoxicating liquors, did sell intoxicating

liquors after the hour of twelve o'clock, midnight. Upon complaint duly made, the said Henry Niebuhr was arrested and brought before the municipal court of the county of Dane to answer for selling liquor as aforesaid, and on the eighth day of August, 1905, on his plea of guilty, the said Henry Niebuhr was convicted by said court of having made the sale above complained of, and was sentenced to pay a fine for such violation. Your complainant therefore prays that a summons be issued by the common council of said city of Madison, signed by the city clerk and directed as prescribed by law, commanding the said Henry Niebuhr, so complained of, to appear before the said common council, at a time and place to be named in said summons as provided by law, to show cause why the license so issued to him as aforesaid should not be revoked. F. T. GALPIN."

(6) That a summons was thereafter duly issued on said complaint and served on said Niebuhr, upon the return day of which the mayor and a quorum of aldermen were present, and said Niebuhr appeared and answered said complaint and introduced the affidavits of two other persons, and the chief of police and police captain made statements.

(7) That there was no conflict in the evidence, and that it was clearly established that on said 23d day of July Niebuhr violated said ordinance by keeping his saloon open between midnight and 5 o'clock a. m., but, nevertheless, said council neglected and refused to find according to the facts, but dismissed the proceedings; all of the aldermen present at the meeting voting therefor except the defendants *Constantine, Rowley, Schmedeman,* and *L. S. Smith.*

(8) That no objection was made before the council to the sufficiency of the complaint nor to the reading of Niebuhr's answer and affidavits, that said answer and affidavits were read by his own attorney, and that the statement of the chief of police was made at Niebuhr's request.

As conclusions of law the court found that the complaint of said *Galpin* charged said Niebuhr with violation of said ordinance, and that the answer of said Niebuhr was an ad-

mission of guilt thereof, that said common council in dismissing the proceedings acted arbitrarily and capriciously, and that the relators were entitled to a peremptory writ of *mandamus* as prayed in the petition, with costs against the aldermen who were responsible for the dismissal of the proceedings. No exceptions were preserved to these findings.

For the appellants there was a brief by *John A. Aylward,* attorney, and a separate brief by *C. F. Lamb,* of counsel, and oral argument by *Mr. Aylward.*

For the respondents there was a brief by *Richmond, Jackman & Swansen,* and oral argument by *S. T. Swansen.*

WINSLOW, J. It must be considered as settled in this state that *mandamus* will lie to compel the common council of a city to revoke a liquor license in a case where, upon complaint duly made, the facts requiring such revocation are established beyond dispute. *State ex rel. Buchanan v. Kellogg,* 95 Wis. 672, 70 N. W. 300. It is argued that *certiorari* is a complete and adequate remedy, but this position is clearly untenable. *Certiorari* is a complete and adequate remedy for one who has been wrongfully deprived of his license, because a reversal of the judgment of the council will have the effect of reinstating his license. *State ex rel. Sullivan v. Tomah,* 80 Wis. 198, 49 N. W. 753. But where the council dismisses the proceedings when it should have revoked the license, a judgment reversing that dismissal is absolutely barren of any substantial result except to remove a possible bar to the beginning of a new and independent proceeding for revocation. This cannot be considered as an adequate or complete remedy. Thus the question is fairly presented whether under the facts as found it was the imperative duty of the common council to revoke Niebuhr's license upon the hearing. Sec. 1558, Stats. 1898, provides that upon verified written complaint made by a resident and filed with the city clerk charging that any licensed person keeps or maintains a disorderly

house, permits gambling therein, has sold liquor to a minor without written order of his parents or guardians, or to intoxicated persons or to known habitual drunkards, "or that he has not observed . . . any order of such supervisors, trustees, aldermen, or county superintendent of the poor, or any of them, made pursuant to law," the council shall issue a summons commanding the licensed person to appear at a time and place named and show cause why his license should not be revoked, such summons to be served in the manner described by the section. Sec. 1559 provides that if upon such hearing "the board shall find the complaint to be true the license shall be revoked, and if untrue the proceeding shall be dismissed without costs to the accused."

The appellants claim that the word "order," in sec. 1558, *supra,* does not refer to an ordinance of the city council, but only to the order or notice authorized to be given under the terms of sec. 1554 by said officials to licensed persons forbidding the sale of liquor for one year to spendthrifts. We are unable to agree with this contention. Had this order been the sole thought of the legislature, it would have been not only easy, but natural, to refer to it as an order made under the provisions of sec. 1554. On the contrary, it seems evident from the use of the broad words "any order . . . made pursuant to law" that the legislature intended to include many possible orders rather than one particular order. The word "order" is a word of broad and general meaning. It includes all commands, precepts, or rules made by competent authority. An ordinance passed by the board of aldermen which has been approved and published so as to become a valid ordinance is in the highest sense an order or command of the aldermen. If it be within their power, it is an order made pursuant to law. If it be an order legitimately regulating the saloon business, we can entertain no doubt that it is one of the orders referred to in the statute. To hold otherwise would seriously emasculate the statute, the evident pur-

pose of which is to secure obedience by means of a penalty more effective than paltry fines; *i. e.* by revocation of license. This construction seems strengthened by the fact that the bond given by a licensed saloonkeeper under sec. 1549 is required to contain conditions substantially identical with the provisions of sec. 1558, closing with the condition that the licensed person will "obey *all* orders of *such* supervisors, trustees, or aldermen, or any of them, *made* pursuant to law." This section precedes sec. 1554, providing for the giving of notice by aldermen forbidding sales to spendthrifts, and it seems that the words "such aldermen," in sec. 1549, can hardly refer to individual aldermen, but to common councils, because there are no provisions prior to sec. 1549 in the excise law giving individual aldermen any power to make orders, but only grants of power to common councils to issue licenses. If the words "such aldermen," in sec. 1549, refer to the common council, the argument is strong that the same words used in the same connection should have the same meaning in sec. 1558.

It is further argued, however, that the complaint made to the council did not charge a violation of the ordinance, and in fact charged no offense of any kind, and that there could be no revocation of the license on such a complaint, and reliance is placed on *State ex rel. Sullivan v. Tomah,* 80 Wis. 198, 49 N. W. 753, where it was held that, if the complaint be fatally defective, the council should dismiss the proceeding upon objection being made that no offense was charged. It must be at once admitted in the present case that the complaint before the council was radically defective. Instead of charging in apt language that Niebuhr failed to close his place of business and exclude customers therefrom at 12 o'clock midnight, or that he failed to keep the same closed between the hours of 12 o'clock midnight and 5 o'clock a. m., it charged that Niebuhr sold intoxicating liquors on the premises after the hour of 12 o'clock midnight on the 23d day

of July. While this might perhaps be construed as charging in effect that he failed to exclude customers from his premises, it did not charge that such failure took place between the hours of 12 o'clock midnight and 5 o'clock a. m. A sale made at noonday of July 23d would fully satisfy the charge. Had objection been taken, as in the case last cited, the complaint should doubtless have been dismissed. But no objection was taken. The accused appeared and filed a written answer in which, while denying that he sold any liquors, he expressly admitted that his saloon was open on the night in question until twenty minutes after midnight and that he was personally in charge; and he explains and endeavors to excuse his delinquency by the fact that he was having a dispute with a customer as to whether he had paid his bill for drinks ordered before 12 o'clock. The answer further admits that he pleaded guilty to a technical violation of the 12-o'clock ordinance of the city and paid a fine therefor, and that this should be considered as a sufficient punishment for any violation of the ordinance, if such there has been. The affidavits of two other persons who were in the saloon at the time were introduced by the accused, and these affidavits practically stated the same facts as to the saloon being open and customers on the premises for twenty minutes after 12 o'clock.

Thus both the answer and the proofs showed a clear violation of the closing ordinance. No objection had been made to the sufficiency of the complaint, and the question is whether under these circumstances the council had any choice as to the course to be pursued. We think it had not, even applying the strict rules of criminal pleading to the case, as was done in the case of *State ex rel. Sullivan v. Tomah,* 80 Wis. 198, 49 N. W. 753. Much progress has been made in ridding the criminal law of the reproach that it allows minute defects and trivial technicalities, by which none is misled, to subvert the course of substantial justice. The ancient rules of strict-

ness in pleading and procedure have been greatly relaxed. Defects or imperfections in matters of form at any stage of the proceedings which do not tend to prejudice the defendant are to be disregarded (Stats. 1898, secs. 4658, 4659), and our Statutes have gone so far as to provide that "no indictment, information, process, return, or other proceedings in a criminal case in the courts or course of justice *shall* be abated, quashed or reversed for *any* error or mistake where the person and the case may rightly be understood by the court, and the court may, on motion, order an amendment curing such defect." Stats. 1898, sec. 4706. The complaint before the council would have charged a substantial violation of the ordinance had the words "and before five o'clock a. m." followed the words "after the hour of twelve o'clock midnight." The answer of the accused showed conclusively the fact thus omitted, and thus the case stood when the case closed, with no objection at any stage of the proceeding. It would be idle to say that the person and the case could not be rightly understood by the tribunal. Indeed, it seems that to understand them wrongly would require greater genius for misunderstanding than city councils are ordinarily supposed to possess. The statute is imperative. It leaves nothing to discretion. The ordering of an amendment cuts no real figure save to impart formal regularity to that which on its face is irregular. Whether the proceedings be amended or not the inhibition against abating or quashing the proceedings is equally imperative.

We conclude that the peremptory writ of *mandamus* was rightly ordered.

By the Court.—Judgment affirmed.

MASH, Respondent, vs. BLOOM, Appellant.

December 7, 1906—January 8, 1907.

Quieting title: Equity: Adequate remedy at law: Conditions subsequent: Re-entry: Forfeiture: Practice.

1. Plaintiff brought an action in equity for breach of condition subsequent, seeking the enforcement of her rights under a deed given by her to defendant, and asked to have it canceled and removed as a cloud on the title. The condition was not embodied in an instrument separate from the deed of conveyance and did not rest in parol. *Held*, that plaintiff had a full and adequate remedy at law and hence could not invoke the jurisdiction of equity for the determination of her rights.
2. Where a court of equity grants relief upon the principle of *quia timet*, thus preventing any vexatious or wrongful use of agreements which are in fact conditions subsequent, and removing them as a cloud upon the title, it is immaterial whether or not the plaintiff is in possession of the premises.
3. Where a grantee of lands has defaulted in the conditions of the conveyance, the grantor's claim to the right of possession and the grantee's denial thereof operates as a re-entry vesting the title in the grantor, and the rule that equity will not lend its jurisdiction to effect a forfeiture is not violated.
4. The grantor in a deed brought an action in equity alleging that the condition of the deed was broken and for that reason she was entitled to have the actual possession restored. *Held*, that proof of such breach would entitle the grantor to judgment declaring the conveyance forfeited and awarding her possession.
5. Such procedure affords a full, complete, and adequate remedy, enforceable in an action in ejectment, and hence it is error to award judgment in an equitable action canceling the deed and restoring to the grantor, as owner in fee, all her rights in the property.

APPEAL from a judgment of the circuit court for Dane county: E. RAY STEVENS, Circuit Judge. *Reversed.*

An action in equity. For breach of condition subsequent plaintiff seeks enforcement of her rights under a deed given by her to the defendant and asks to have it canceled and removed as a cloud on the title. The complaint alleges that on

November 23, 1903, plaintiff was the owner of the real estate in question, and that on this day she conveyed these premises by deed to the defendant *George F. Bloom* in consideration of one dollar, natural love and affection, and such special consideration as is expressed in the following clause inserted in the deed:

"The special considerations and conditions upon which this deed is executed, made, and delivered are: That the said *George F. Bloom* and his wife, during the remainder of my natural life, shall live in the house on the premises above conveyed and shall be good and kind to the said *Rebecca M. Mash* and shall help take care of her and nurse her and administer to her natural wants, as good, loving, affectionate and kind children would do for a parent.

"These 'special considerations and conditions' shall subsist and inure for my benefit while I, the said *Rebecca M. Mash,* shall continue in life. And with my death the same shall cease and be as if they were not written in this deed. They are here written solely and exclusively for my sole, personal benefit and to secure the good faith and conduct herein of said *George F. Bloom* and wife while I shall live and for the use and benefit of no other person or persons whatsoever."

The property is situated in the city of Madison and has a value of from $3,500 to $4,000. It is alleged that the plaintiff, the grantor in this deed, is seventy-two years of age, and is a widow without any children or other relatives to care for her in her declining years. The defendant's wife, Sarah Bloom, is a niece of plaintiff's deceased husband. In his lifetime he entertained a very kindly feeling toward his niece and loved her much, and the plaintiff, prior to the making of this deed, respected her and entertained full confidence in her as a friend and as a trustworthy and highly respected person. Plaintiff also at that time entertained a high regard for and friendly feelings toward *George F. Bloom* and believed him to be a man of honesty and integrity. Plaintiff resides in her house, situated on the lot, a portion of which she con-

veyed to defendant. She delivered the deed to the defendant, and immediately thereafter defendant and his wife moved into the house which is situated on the part of the lot so conveyed. It is alleged that this deed was made, executed, and delivered pursuant to a parol agreement of the parties to this action to the effect that they were to care for and nurse plaintiff; that such care and nursing was to include personal attention by them to plaintiff's household duties, preparing and serving her food, and doing all things necessary in attending to the fires in her house, her laundry, her yard, the sidewalk, and the care of her building on the premises; that they were to be her kind and agreeable companions and were to wait upon and nurse her when sick and infirm. It is further alleged that from and after March 17, 1904, defendant has wholly failed to perform these obligations so undertaken by him; that he now continues to disregard these obligations; and that this action is brought to have the deed canceled for this breach of the conditions of the deed, and to have it canceled and removed as a cloud upon the title to her property, and to debar defendant from claiming any right under it.

The defendant denies having breached this agreement as charged by plaintiff, and avers that no agreements were made as a condition of such conveyance except as written and expressed in this deed, and that the conditions expressed in the deed have in all respects been fully performed and carried out, except in so far as plaintiff by her wrongful conduct has prevented this being done and has made it impossible to perform the conditions so assumed. Defendant interposed a demurrer to the complaint and alleged that plaintiff had a complete remedy at law. This was overruled. Defendant answered, and before trial asked an amendment, which was allowed, alleging that plaintiff had a full and adequate remedy at law. This action was tried before the court upon its merits. The court, upon the findings of fact, awarded judg-

ment in plaintiff's favor, upon the ground that defendant had failed to comply with the conditions of the agreement between the parties. The judgment canceled the deed, declared it a cloud upon plaintiff's title to the property, and restored to her as owner in fee all rights in the property. This is an appeal from the judgment.

For the appellant there were briefs by *Tenney, Hall & Tenney,* and oral argument by *F. W. Hall.*

Frank E. Parkinson, for the respondent.

SIEBECKER, J. The controlling question of law presented by appellant is the right of respondent, upon the facts and circumstances on which she relies for relief, to invoke the jurisdiction of equity for the determination of her rights. Her claim that this court has repeatedly granted equitable relief upon like grounds is challenged by appellant, and we are cited to the decisions of this court to justify such contentions. Appellant asserts that these decisions show that, whenever equitable relief has been awarded in this class of cases, it was upon the ground that the parties had no full and adequate remedy at law to enforce their rights, and that the facts of this case do not present such a case for the reason that plaintiff can, by action in ejectment, fully, adequately, and expeditiously enforce and protect her rights. An examination of the cases cited and relied upon by the parties in support of their respective contentions convinces us that equitable relief has been granted in cases only where the facts and circumstances shown demanded some form of relief not within the power of a court of law but which could be reached by some equitable remedy. *Delong v. Delong,* 56 Wis. 514, 14 N. W. 591, a case in substance like the one before us, is the only case that has come to our attention which can serve as a precedent, and this was an action in ejectment. True, all these cases dealt with defaults concerning agreements by parties who had obligated themselves to pay some sum of money

in small amounts at stated periods for the support of some person, to render some personal service to them, or, in some form, in consideration of the transfer of real or personal property by them, to make provision for their necessities in life. But in all except the *Delong Case* the contract for such payment, support, and maintenance was embodied in a separate instrument from the deed of conveyance or rested in parol, thus leaving the deed of conveyance of such property in the form of an absolute conveyance. To restore the parties to such a transaction to their right in the property conveyed in consideration of such support and maintenance required the employment of the power of a court of equity, which brought the parties before the court and ascertained what obligations as a condition of the deed had been entered into for the benefit of the grantors. In the syllabus of *Glocke v. Glocke,* 113 Wis. 303, 89 N. W. 118, in which case these questions were fully considered, the rule is stated as follows:

"To the end that the conditional grantor's remedy may be complete, [equity] will cancel all writings and records that might otherwise be used, presently or in the future, to his prejudice, acting, not upon the theory that they are avoided by the court, but that they are void independent thereof, and that equity jurisdiction is required to settle the status of the property in accordance with the facts, on the principle of *quia timet,* and to clear away those things which, though void in fact, might, by reason of their apparent force, be used by the holders thereof in some way, presently or in the future, wrongfully."

Other cases in this court, which were brought and determined within the jurisdiction of equity, are the following: *Bogie v. Bogie,* 41 Wis. 209; *Bresnahan v. Bresnahan,* 46 Wis. 385, 1 N. W. 39; *Morgan v. Loomis,* 78 Wis. 594, 48 N. W. 109; *Hartstein v. Hartstein,* 74 Wis. 1, 41 N. W. 721; *Beckman v. Beckman,* 86 Wis. 655, 57 N. W. 1117; *Wanner v. Wanner,* 115 Wis. 196, 91 N. W. 671.

Counsel for both parties devote much consideration to the

question whether or not plaintiff is precluded from suing in equity because she is not in the actual possession of the premises. In view of the importance attached to this subject, we deem it proper to advert to it and to state that in the foregoing cases the court of equity granted relief upon the principle of *quia timet,* thus preventing any vexatious or wrongful use of agreements which by construction were declared to be in fact conditions subsequent, and removing them as a cloud upon the title. Since these are the grounds upon which equity is set in motion, it is immaterial whether or not the plaintiff in such a case is in possession of the premises. In the following cases it was expressly held that the fact that plaintiff was not in possession could not affect the right to maintain such an action, for the reason that the legal remedy in restoring possession in such cases is inadequate, in that it leaves some void instrument or muniment of title outstanding and uncanceled. The distinguishing feature of this class of cases consists in the fact that the invalidity of the hostile cloud sought to be removed cannot be established except by a resort to evidence *aliunde* the record. *Pier v. Fond du Lac,* 38 Wis. 470; *Goodell v. Blumer,* 41 Wis. 436; *Smith v. Sherry,* 54 Wis. 114, 11 N. W. 465; *Smith v. Zimmerman,* 85 Wis. 542, 55 N. W. 956; *Davenport v. Stephens,* 95 Wis. 456, 70 N. W. 661; *Kruczinski v. Neuendorf,* 99 Wis. 264, 74 N. W. 974; *Gilchrist v. Foxen,* 95 Wis. 428, 70 N. W. 585. In view of her theory and position before the court, the suggestion that plaintiff is attempting to enforce a forfeiture is not strictly correct. She asserts that defendant defaulted in the conditions of the conveyance, and that her claim to the right of possession and defendant's denial of it operates as a re-entry and vests the title in her. Whenever parties can properly invoke the jurisdiction of equity, "in such a case the court does not lend its jurisdiction to effect a forfeiture. The rule in that regard is not violated. The forfeiture, or rescission as it is sometimes called, is

effected by the acts of the grantor, by his re-entry, or its equivalent, for condition broken." *Glocke v. Glocke,* 113 Wis. 303, 89 N. W. 118; sec. 3079, Stats. 1898; *Maginnis v. Knickerbocker Ice Co.* 112 Wis. 385, 88 N. W. 300.

The question remains: Does plaintiff's case support her contention that she requires the aid of equity to have this property restored to her with a clear title? She alleges that the condition of the deed was broken, and she is for that reason entitled to have the actual possession restored to her. The complaint alleges a state of facts which shows that she seeks to recover the possession of real estate, the title to which has reverted to her by reason of a breach of a condition subsequent. To enforce this right it is necessary to establish the breach of condition alleged. Proof of such breach would entitle her to judgment declaring the conveyance had been forfeited and an award to her of the possession of the property. This procedure would enforce all her rights and accomplish the complete restoration of her rights as before the conveyance, and result in canceling the deed as of no further effect and therefore void. This would be a full, complete, and adequate remedy, enforceable in an action in ejectment. Under such circumstances the parties are left to enforce their rights in such an action at law. This was the course pursued in *Delong v. Delong,* 56 Wis. 514, 14 N. W. 591, which was a similar case, in that the grounds of relief were for breach of a condition in a deed providing for the support of the grantor. It has been repeatedly ruled from an early period that, if parties can enforce their rights to recover the possession of real property in an action in ejectment, equity will not aid them. *Clark v. Drake,* 3 Pin. 228; *Mills v. Evansville Sem.* 47 Wis. 354, 2 N. W. 550; *Lawe v. Hyde,* 39 Wis. 345; 1 Pomeroy, Eq. Jur. (3d ed.) § 459, and cases cited; *Donnelly v. Eastes,* 94 Wis. 390, 69 N. W. 157.

We are persuaded that the court erred in not holding, as

asserted by defendant at the first opportunity, that plaintiff has a complete and adequate remedy at law. This necessarily calls for a reversal of the judgment and the dismissal of the action. It is therefore unnecessary to consider whether the evidence and findings support the judgment.

By the Court.—The judgment appealed from is reversed, and the cause remanded to the circuit court with directions to award judgment of dismissal of the action.

The following opinion was filed January 23, 1907:

MARSHALL, J. (*concurring*). I will state a few propositions, unaccompanied by discussion, which it seems govern this case.

1. Where the holder of the legal title to land is out of possession and another adversely withholds the same under claim of title, the former need not, necessarily, sue in equity to vindicate his right because the invalidity of the latter's claim must be established by evidence *aliunde* the record.

2. In the situation stated, there being no circumstance making the case classible under a recognized head of equity jurisprudence, the true owner cannot properly sue in equity to avoid his adversary's claim and regain possession.

3. In such situation the mere fact that the hostile claim appears of record and as a cloud on the true title does not entitle the true owner to use equity jurisdiction to regain possession, since an action at law will remedy the wrong and incidentally remove the cloud, but the case is otherwise where the hostile title is founded on fraud which must be established by evidence *aliunde* the record. It is fraud or some other efficient circumstance which justifies the use of the equitable remedy. *Burrows v. Rutledge,* 76 Wis. 22, 25, 44 N. W. 847.

4. In such situation if the holder of the legal title is such by forfeiture of his adversary's title for breach of condition

subsequent, which breach, but not the condition, must be established by evidence *aliunde* the record, no question of fraud or other efficient question, such as mistake, being involved, such holder may sue at law to regain possession of the property.

5. In the situation last above indicated, except that the condition subsequent is not contained in the deed or any instrument forming a part of an entire transaction including the deed but which must be established by implication from the circumstances, as in case where a person makes a conveyance in the ordinary form, the real consideration, however, being personal attention and support of the grantor by the grantee, the person who shall have regained title by breach of condition subsequent must sue to regain the property, in equity, but solely on the ground that the condition itself is a discovery, so to speak, only competent to be made and declared by that jurisdiction.

6. The distinction between *Delong v. Delong,* 56 Wis. 514, 14 N. W. 591, and similar cases, and *Glocke v. Glocke,* 113 Wis. 303, 89 N. W. 118, and similar cases, is that in the former the condition subsequent was declared by the parties in writing as a part of the transaction which included the making of the deed, while in the latter the condition was declared by the court as an implication from the circumstances which equity jurisdiction, by a rule of construction, so to speak, peculiar to itself, could determine was the intention of the parties.

This case belongs to the first class, hence the action in equity was improperly brought. To sustain it would violate the constitutional guaranty of the right of trial by jury.

WINSLOW, J. I concur in the views expressed by Mr. Justice MARSHALL.

THOMPSON, Respondent, vs. FUHRMANN, Appellant.

December 7, 1906—January 8, 1907.

Boundaries: Courses and distances: Ancient monuments: Surveys: Relocation of section corners: Conflict of evidence: Waters and watercourses: Trespass: Cutting ice: Evidence: Appeal and error: Verdict: Instructions to jury.

1. In the location of boundaries courses and distances must give way to ancient monuments.
2. Where there was conflict of evidence as to a section line, the location of which depended on the correct relocation of a section corner, the verdict of a jury on such disputed question of fact is *held* supported by the testimony of plaintiff's surveyors that they established the corner with reference to a bearing tree, an ancient monument, and absence of any evidence that they violated any rule of law in establishing the corner.
3. In an action for trespass in cutting and carrying away ice, alleged to be the property of plaintiff, the evidence, stated in the opinion, is *held* to support findings that the trespass was committed before the commencement of the action.
4. In an action for trespass in cutting and carrying away ice claimed to be the property of plaintiff, one issue was the location of a section line bounding the tract from which the ice was cut. The location of this line depended upon the correct relocation of an original government section corner. Each party gave testimony of a survey, each showing a different location. The court instructed the jury that the plaintiff was required to show by a "preponderance" of the evidence that he was in possession of the land from which the ice was taken by defendant, and the jury were required to determine which of the surveys correctly located the original line fixed by the government survey; that if the corner could not be ascertained with absolute certainty, yet if, from known and existing monuments, bearing trees, field-notes, and other means, the location could be ascertained with reasonable certainty, that would be sufficient; and that the first fact the jury would have to determine was whether the evidence, viewed in the light of the instructions which the court had given, established the location of this original government corner. The defendant requested no specific instructions, and the exception was general and not to any specific part of the charge. *Held*, that the charge as a whole was sufficiently favorable to the defendant.

APPEAL from a judgment of the circuit court for Sauk county: E. RAY STEVENS, Circuit Judge. *Affirmed.*

This is an action of trespass *quare clausum fregit* originally brought in justice's court. The complaint alleges, in effect, that on the 6th day of February, 1905, at the city of Reedsburg, Sauk county, Wisconsin, the defendant with force and arms unlawfully broke and entered the respondent's close and premises in respondent's possession, and described as the "N. E. ¼, N. E. ¼ of section 9, town 12 north, range 4 east, being in the city of Reedsburg, except that part thereof lying north and west of the northern and westerly boundaries of the Baraboo river and Hay creek," and plowed, cut, and carried away a large quantity of ice then and there situate, the property of the plaintiff. The answer of the appellant set up title to the property in question, and, upon filing the proper bond, the case was removed to the circuit court for Sauk county, where a trial was had before the court and a jury. At the close of respondent's testimony the appellant moved for a nonsuit, which was denied. At the close of all the testimony both parties moved for a directed verdict, which motions were denied, and the case submitted to the jury and the following verdict returned:

"(1) Do you find that a trespass was committed by the defendant upon the premises in possession of plaintiff? *A.* Yes. (2) If your answer to question No. 1 be 'Yes,' was such trespass committed before the commencement of the suit on the 8th day of February, 1905? *A.* Yes. (3) Was the original government line dividing sections 9 and 10, township 12, range 4, Sauk county, Wisconsin, located where fixed by the surveys of Mr. Hulbert and Mr. Darrow? *A.* Yes. (4) If your answer to question No. 1 be 'Yes,' what amount will compensate the plaintiff for the damage suffered by him through such trespass? *A.* $20. (5) If your answer to question No. 1 be 'Yes,' then was such trespass committed wilfully, wantonly, or with malice or illwill toward the plaintiff? *A.* Yes. (6) If your answer to question No. 5 be 'Yes,' then at what amount do you assess damages because of that fact? *A.* $15.27."

On the coming in of the verdict the appellant moved that the answers be changed. The court changed some of the answers to the special verdict, and refused to change the answers to questions 1, 2, 3, and 4, and directed judgment upon the verdict for the respondent for the sum of $20 damages, and costs. A motion to set the verdict aside and for a new trial on the part of the appellant was denied. Appellant brings this appeal and relies upon the following errors:

"(1) The court erred in denying defendant's motion for a nonsuit. (2) The court erred in denying the defendant's motion for a directed verdict in his favor. (3) The court erred in denying the defendant's motion to change the answers to questions Nos. 1, 2, 3, and 4 in the special verdict and in directing that judgment be entered for the plaintiff. (4) The court erred in denying the defendant's motion to set aside the judgment and for a new trial."

Ed. C. Gottry, for the appellant.

James A. Stone, for the respondent.

KERWIN, J. The errors assigned involve the following propositions: (1) The plaintiff's possession; (2) whether the alleged trespass was committed before the commencement of the action; and (3) whether the court erred in the admission of evidence and in the charge to the jury. The jury found that a trespass had been committed by the defendant, before the commencement of the action, upon the premises in possession of plaintiff; that the government line in question was properly located by the plaintiff's survey; and fixed the amount of damages. The main question for consideration is whether there is sufficient evidence to support the verdict upon the questions of fact involved.

1. Respecting possession, there is evidence that the plaintiff held under a lease and not a mere license as contended by defendant, and the real controversy is whether the property claimed under the lease included the disputed tract where the trespass is alleged to have been committed. The defendant showed no title to the land, but relied upon the failure

of plaintiff to show title and possession. The ice field had been surveyed and staked out some time before the alleged trespass, and aside from the question of the location of the line in dispute there is evidence that the plaintiff was in possession under claim of right by virtue of a lease of the disputed tract where the trespass was committed. The main controversy, however, on the trial was as to the true line. Two surveys were presented, and the correctness of these was in question. The jury obviously adopted the survey of the plaintiff as establishing the true line as claimed by plaintiff, and we cannot see that they were not warranted in so finding. The controversy between the surveyors was as to the location of the section corner between sections 3 and 4 and 9 and 10. This corner the plaintiff's surveyors testified to having located, and gave evidence to the effect that they found the bearing tree marked by government surveyors. They testified to having run the lines and established the corner and section lines as claimed by plaintiff, and we are unable to see that their evidence does not support the verdict. The plaintiff's surveyors testified that they established the corner with reference to the bearing tree, an ancient monument, and it is well settled that courses and distances must give way to ancient monuments. *Marsh v. Mitchell,* 25 Wis. 706; *Vroman v. Dewey,* 23 Wis. 530; *Jones v. Kimble,* 19 Wis. 429; *Racine v. J. I. Case P. Co.* 56 Wis. 539, 14 N. W. 599; *Madison v. Mayers,* 97 Wis. 399, 73 N. W. 43; *Racine v. Emerson,* 85 Wis. 80, 55 N. W. 177. We cannot find from the record that the plaintiff's surveyors violated any rule of law in establishing the corner, the accuracy of their surveys appearing from the evidence to be verified by the known monument, the bearing tree. We shall not attempt a review of the evidence. It is sufficient to say that the evidence of the surveyors is in conflict as to the location of the line, and we think the verdict of the jury upon this disputed question of fact is supported by the evidence.

2. It is also argued that there is no proof as to when, if at all, any trespass was committed. The affidavit, which stands for the complaint, alleges the trespass on February 6th, the warrant was issued on the 8th, and the arrest made on that day. Under the issues raised, the dispute seems mainly to have been upon the question of title and not the cutting or removal of ice from the plaintiff's close. The complaint charges the breaking and entering of the plaintiff's premises and the cutting and carrying away of ice, the property of plaintiff. The answer admits that at the time mentioned in the complaint defendant had been engaged in cutting ice in the Baraboo river and Hay creek, city of Reedsburg, Sauk county. It seems clear that the controversy was directed to the question of the true line, and whether the cutting was over the line within the ice field of plaintiff, and not respecting the cutting. We think, however, that there is sufficient evidence to support the verdict that there was ice taken by the defendant from the disputed tract prior to the commencement of the action February 8th. All ice cut up to the morning of February 9th appears to have been estimated and a survey made of the ice field where the cutting was done, and testimony given upon the trial respecting the matter. While the evidence is far from being clear upon the subject, we think there is sufficient to support the verdict respecting the trespass before the commencement of the action and the damages sustained in consequence of such trespass up to the time of the commencement of the action.

The second question of the special verdict clearly includes damages for trespass committed up to the time of the commencement of the action. The case seems to have been tried upon the theory of including any trespass between February 6th and the time of commencement of the action, February 8th.

3. It is contended that the court erred in sustaining objection to the question asked by defendant's counsel of Mr.

Kruger as to conversation with Mr. Ellinwood respecting the disputed line. We do not see how any statements made by Mr. Ellinwood respecting the true line between sections 9 and 10 could bind the plaintiff. We find no foundation in the record for the admission of any such evidence, and therefore think the testimony was properly excluded.

Counsel further alleges error in that the court should have instructed the jury that they must be satisfied of the correctness of the Darrow survey by "evidence very clear and certain," and not by mere "preponderance" of the evidence. Counsel also complains of the following portion of the charge:

"If the corner cannot be ascertained with absolute certainty, yet if, from known and existing monuments, bearing trees, field-notes, and other means, the location can be ascertained with reasonable certainty, that will be sufficient."

An examination of the whole charge shows that it is not open to the criticism, especially since no specific instruction was asked. The court told the jury that the plaintiff was required to show that he was in possession of the land from which the ice was taken by defendant, and that they were required to determine which of the surveys correctly located the original line fixed by the government survey, and further, after giving the portion excepted to, said:

"In answering this question, the first fact that you will have to determine is whether the evidence, viewed in the light of the instructions which the court has just given you, established the location of this original government corner."

We think it very clear that the charge as a whole was sufficiently favorable to the appellant. *Daskam v. Beemer,* 64 Wis. 13, 24 N. W. 485; *Lewis v. Prien,* 98 Wis. 87, 73 N. W. 654. Moreover, the appellant not only failed to ask any instruction, but the exception seems to be general, and not to any specific part of the charge. The action was possessory. There was no question of injury to the freehold. The damages claimed and recovered were for the ice cut and removed,

owned and in the possession of plaintiff. The questions involved were of fact upon which the evidence was conflicting, and we cannot say that there is no credible evidence to support the verdict. We think the case was fairly tried and that no prejudicial error was committed.

By the Court.—The judgment below is affirmed.

THE STATE, Respondent, vs. EVANS, Appellant.

December 8, 1906—January 8, 1907.

Constitutional law: Class legislation: Equal protection of the laws: Public policy: Pharmacists: Regulation: Discrimination based on population: Evidence: Relevancy: Materiality.

1. In determining the constitutionality of class legislation based on population it must be borne in mind (1) that there are distinctions between large and dense communities and small and sparser ones as separate classes, and such differences are general and relevant to some purposes of legislation; (2) that merely the distinctions between individuals of one class and of the other are not to be considered; (3) that the line of demarcation may be arbitrary.
2. By the enactment of ch. 56*a*, Stats. 1898, regulating the practice of pharmacy and drawing a line between communities over and under 500 population for application of the prohibition against independent practice by assistant pharmacists, the legislature did not transgress its legitimate field of discretion over public policy, and the statute is constitutional.
3. Ch. 56*a*, Stats. 1898, while originally enacted in 1882, was prospective in contemplation, prohibited the various acts according to conditions as they might exist at the time of their commission, and hence is not open to the construction that it is based on circumstances existing at the time of the act, and prohibits and punishes the practice of pharmacy by other than a registered pharmacist in communities which in 1882 had 500 population or more, while permitting practice by assistant pharmacists in all places which at the same date had less than 500 population.

4. Ch. 56*a*, Stats. 1898, is not void simply because it fails to provide a method of ascertaining or proving the population and leaves that fact to be proved by the ordinary common-law means of evidence instead of prescribing a statutory method.
5. The statute regulating the practice of pharmacy (ch. 56*a*, Stats. 1898, as amended by ch. 340, Laws of 1901) exempts from the operation of the general law such persons of good moral character as, previous to the enactment of ch. 167, Laws of 1882, had had ten years' experience as pharmacists. *Held* that, even if such exemption was valid (a point not decided), the only result would be that the liability of one not within the exempted class would remain as it was before the amendment.
6. In an action to enforce the penalty denounced by ch. 56*a*, Stats. 1898, regulating the practice of pharmacy, testimony of a pharmacist as to whether he saw any reason for discriminating between large and small communities is irrelevant.
7. In an action against a physician who maintained a pharmacy in a village of more than 500 population, he not being or having in his employ a registered pharmacist, to enforce the penalty denounced by ch. 56*a*, Stats. 1898, a question was asked a witness whether "it would interfere with defendant's practice as a physician if his prescriptions could not be put up at his own store." The statute provides, among other things, that it shall not "interfere with any practicing physician from dispensing his own medicines or supplying his patients with such articles as may seem to him proper." *Held*, that the question was immaterial.

APPEAL from a judgment of the circuit court for Dane county: E. RAY STEVENS, Circuit Judge. *Affirmed.*

Action for penalties for keeping a drug and pharmacy store in a village of more than 500 population, defendant not being, and not having in his employ, a registered pharmacist, as required by sec. 1409*g*, Stats. 1898, as amended, and for, at the same time, permitting the retailing, compounding, and dispensing of drugs by a person, to wit, defendant's son, not a registered pharmacist and not under the charge of a registered pharmacist. The defendant and appellant, since 1884, has been a duly licensed and practicing physician located at Mt. Horeb, Dane county, Wisconsin, and had been engaged

in the pharmacy business continuously since 1888. It was stipulated that he was not a registered pharmacist and did not have in his employ a registered pharmacist, but that he and also his son, C. Milo Evans, who took charge of the store during his absence, are and were assistant registered pharmacists; that the latter was permitted to compound and dispense drugs, medicines, and poisons and did so at the time charged in the complaint without the supervision or charge of a registered pharmacist. Opinion evidence was offered and excluded to the effect that there was no more reason for requiring a registered pharmacist in charge of a drug store in cities or villages containing more than 500 population than in those which contained less. The defendant's office as a practicing physician was in, and in connection with, the drug store, and the latter had been conducted by him, in connection with his practice as a physician, for about twenty years. It was stipulated that the acts complained of did not come within any of the statutory exceptions. The trial was had to the court without a jury, and the defendant found guilty upon both counts of the complaint, and judgment rendered against him for $100 and costs, from which he brings this appeal.

For the appellant there was a brief by *R. M. Bashford* and *O. A. Stolen,* and oral argument by *Mr. Bashford.*

The *Attorney General,* for the respondent.

Dodge, J. The fundamental question raised is the constitutionality of our statutes regulating the practice of pharmacy, ch. 56*a,* Stats. 1898, with its amendments, and especially sec. 1409*g,* imposing penalties. Those acts, summarizing the elements important to this discussion, provide for the licensing of pharmacists and of assistant pharmacists, requiring for each a specified but different age and experience, together with diploma or examination by the state board of pharmacists. Sec. 1409*g* prohibits retailing or dispensing of drugs, or the maintenance of any pharmacy therefor, in

any town, city, or village having 500 population or more, except by or under charge of a registered pharmacist, while in towns, cities, or villages of less than 500 population similar acts are prohibited, except by a registered pharmacist or assistant pharmacist, or under his charge. It also imposes a penalty of $50 for each offense. Exception is made in favor of a practicing physician in dispensing his own medicines. No substantial contention is made that the business or profession of pharmacy is not a legitimate field for police regulation by reason of peril to health or lives in the community generally which may result from incompetence therein. This subject is set at rest in this state by *State v. Heinemann,* 80 Wis. 253, 49 N. W. 818. Neither is it contended that the requirements of experience or school education and examination are not reasonably germane to the subject of competency. Neither can there be successful contention that there is in that respect any classification of individuals except on the lines of competency, for every one who becomes a registered pharmacist has the same right as any other in that class to practice anywhere and everywhere in the state, and every one who becomes a registered assistant is also privileged and restricted equally with every one in his class, and those who have not qualified at all are equally restricted from the practice. Indeed, there is no complaint on this subject.

The principal objection to the law is that it classifies localities, allowing some to be served in the business of pharmacy by assistant pharmacists, who, as a class, presumptively have less of competence than is demanded of registered pharmacists, by whom the larger communities are required to be served. It is strenuously urged that here is false classification; that the life and health of every individual and of the public is as important in the little hamlet as in the great city, and that any protection against incompetent dispensers of drugs is as much due to the one as the other; that, the purpose of the act being the promotion of the safety of the com-

munities in obtaining necessary supply of medicines, there is no distinction between communities over 500 in number and those less which is in any wise germane to the purposes of this police regulation of the business. Doubtless this law, like all other police laws, presents classification, and we are confronted, as in the case of every such law, with the duty to consider the relationship of the distinctions between the classes to the subject of the legislation. Of course there must be such relationship. A mere arbitrary distinction in no wise relevant to the subject of legislation will not justify a departure from that equal protection of the laws commanded by the XIVth amendment to the federal constitution, nor that equality before the law commanded by sec. 1, art. I, of the Wisconsin constitution. It is unnecessary, and probably futile, to attempt again to state those rules as to classification in legislation which have been phrased so often to the utmost of the ability of the judges writing the opinions. The citation of a few illustrative cases will suffice: *Adams v. Beloit,* 105 Wis. 363, 81 N. W. 869; *State ex rel. Kellogg v. Currens,* 111 Wis. 431, 436, 87 N. W. 561; *Black v. State,* 113 Wis. 205, 219, 89 N. W. 522; *State ex rel. Risch v. Trustees,* 121 Wis. 44, 54, 98 N. W. 954; *State v. Whitcom,* 122 Wis. 110, 119, 99 N. W. 468; *Bingham v. Milwaukee Co.* 127 Wis. 344, 106 N. W. 1071. That there are distinctions between large and dense communities and small and sparser ones as separate classes is, of course, obvious. That such differences are germane and relevant to some purposes of legislation has been declared, almost without limit, by courts. *Smith v. Burlington,* 129 Wis. 336, 109 N. W. 79, and cases there cited. But, as remarked in that case, each new exercise of the power of police regulation presents anew to the courts the question of possible relationship between the distinguishing characteristics of the classes and the object and purposes of the regulation. As to the cogency or propriety of either the regulations made or of the import-

ance of the distinctions, as we have so often said, the courts have little concern. Those subjects rest with the legislature, and only when the court, in the exercise of the utmost deference toward that other branch of the government, is compelled to say that no one in the exercise of human reason and discretion could honestly reach a conclusion that distinctions exist having any relation to the purpose and policy of the legislation, can it delay its validity. *State ex rel. Kellogg v. Currens,* 111 Wis. 431, 439, 87 N. W. 561; *Black v. State, supra; State ex rel. Risch v. Trustees, supra; Smith v. Burlington, supra.*

In approaching this question it must be continually borne in mind that we are not to consider merely the distinctions between individuals of the one class and of the other. It is a favorite argument of counsel in all these cases to make such comparison, and it is not surprising that we find it pointed out in this case that a town with a population less than 500 situated close to a populous city presents all the reasons for requiring any pharmacy maintained therein to be of as high quality in management as could be demanded within the city itself. The question to be considered, however, is the distinction between the classes as classes, whether there are characteristics which, in a greater degree, persist through the one class than in the other which justify legal discrimination between them. *State ex rel. Kellogg v. Currens, supra; State ex rel. Holland v. Lammers,* 113 Wis. 398, 86 N. W. 677, 89 N. W. 501. Neither need we be disturbed by the fact that the line of demarcation between the classes is arbitrary. Wherever there is a sliding scale of age, population, dimension, distance, or other characteristic which is believed to justify classification, necessarily the division between classes must be arbitrary, and legislation is not to be declared void which adopts the age of twenty-one as marking the right to vote or manage property because the individual at twenty years and eleven months may be as competent as at twenty-

one, nor, in a law distinguishing by population, because no appreciable difference can be conceived between the town of 999 and the town of 1,000, provided, generally, the class of those under twenty-one years of age are less competent to vote or manage property than the class of mankind above that age, or the class of towns which do not include villages of 1,000 population are generally less in need of the governmental powers conferred upon villages than the class of towns which do contain villages of 1,000 and upward.

In the light of these general suggestions we turn to the concrete inquiry whether any reason may fairly be thought to exist why the larger communities through the state should receive, as a class, protection against the perils of incompetent pharmacists, some of which are dispensed with in the case of the petty communities of less than 500 population each, also viewed as a class. Of course one must concede appellant's assertion that the life and health of each individual should be as sacred to the government as that of any other, in the absence of legitimate distinctions between them, and that the mere fact of residence in immediate contact with thousands of his neighbors by no means universally distinguishes one from another who lives in a smaller or more sparsely settled community. Yet the statutes are full of laws which do recognize that protection may be had in the one class which is not possible or politic in the other. No country town not containing a village of 1,000 population has authority to maintain a police force to protect its citizens against violence or burglary, and still there are many reasons why the isolated citizen is much more in need thereof than one surrounded by many neighbors. Distinction is also made with reference to protection against fire; protection of the health of communities by public provision of pure water or public construction of sewers; to which illustrations probably many more might be added. They suffice to show that, in the ordinary course of governmental policy, mass of population has been deemed to

have relation to some of the protections which government does extend to the lives, health, and property of the citizens. Can such discrimination be deemed wise by the legislature? Probably no act, not strictly *malum in se*, which can be performed by any individual or class of individuals, is either unmixed benefit or unmixed injury to the public welfare or convenience; hence the restraint of any act by law, even though it may tend to prevent some injuries or perils, also causes some others by preventing benefits which might result from the doing of the forbidden acts. It is essentially the legislative function to weigh in comparison these countervailing advantages and disadvantages in deciding whether good policy requires the imposition of the restraint. If it be found that conditions resulting from natural laws divide the people or the territory of the whole state into classes such that in one the advantages will preponderate, while in the latter class the injuries will, then classes do exist, naturally, which the legislature may and should recognize, and may legitimately enact the restraint as to one class and omit or relax it as to the other. It is not only desirable that the drugs be dispensed to the public by skilful and competent persons to avert peril from occasional mistakes, but it is far more desirable, nay, practically essential, that medicines be within prompt and easy reach by the public. The danger to life or health to be expected from occasional error of an incompetent salesman is hardly comparable to the injuries likely to result from exclusion of whole communities from opportunity to obtain the ordinary remedies often essential momentarily to save lives. It is, therefore, within the field of legislative discretion to provide only such restrictions as to competence of the dispenser as will not unduly prevent dealing in medicines. We are fully persuaded that legislators, within the bounds of reason, might have believed that this result could be obtained in the large communities consistently with requiring the competence, age, and experience prescribed for registered

pharmacists, but that, in very small or sparse villages and towns, in many cases, the profits would not be sufficient to attract such men, and such communities might be left unprovided; that thus the very forces of nature and human nature had created classes distinguished in respects directly relevant to the subject of protection of life and health by regulating the dispensing of medicines, and therefore proper of recognition and differentiation in framing laws on the subject. If a given restriction which tends to protect lives and health in one class of communities will menace them in another, the very imposition of it generally and without exception might be most obvious and oppressive discrimination. We have already quite clearly intimated our view that a regulation and licensing of plumbers in large cities to exclusion of smaller ones would have been valid but for another discrimination between individuals, though the classification of cities was not expressly considered either in argument or decision. *State ex rel. Winkler v. Benzenberg,* 101 Wis. 172, 76 N. W. 345. We have held constitutional a law regulating pharmacists containing the same classification of towns and villages as the present one, though again it is true that objection was not pressed upon or discussed by the court. *State v. Heinemann,* 80 Wis. 253, 49 N. W. 818. The same considerations above advanced are met in Minnesota by provision that general storekeepers may sell drugs if more than a mile from a pharmacy, and the laws have been fully approved on the grounds above suggested, in face of the argument that life and health are as precious two miles from a drug store as at less distance. *State v. Donaldson,* 41 Minn. 74, 42 N. W. 781. We must conclude, therefore, that in drawing a line between communities over and under 500 population for application of the prohibition against independent practice by assistant pharmacists, the legislature did not transgress its legitimate field of discretion over public policy.

Another consideration urged by the attorney general with

much plausibility is that, in the petty communities, where assistant pharmacists are authorized, stocks are generally likely to be less in volume and intricacy, and pressure of business and haste less to such degree as to largely diminish perils of mistakes even by dispensers of less maturity and experience, but, as we have found other distinctions sufficient to justify the classification, the entire efficacy of this one need not be decided.

Appellant further attacks the classification of localities for the reason, as he contends, that it is based upon circumstances existing at the time of the act, and construes the law as if it prohibited and punished practice of pharmacy by other than a registered pharmacist in any town, city, or village which in 1882 had 500 population or more, while permitting practice by assistant pharmacists in all places which at the same date had less than 500 population. The language of the act is clear beyond need of argument to the contrary, however. Obviously, the statute was prospective in contemplation, and prohibited the various acts according to conditions as they might exist at the time of their commission.

Again, and in this connection, the legislation is assailed because it provides no method of ascertaining or proving the population. Doubtless it would seem wiser to prescribe some specific test of a fact as difficult of proof as is the population of a given territory, as the legislature has done in many of the acts depending upon that fact; but the number of population is a fact capable of being established by evidence, and we certainly should not be justified in holding void an act of the legislature simply because it had left the fact to be proved by ordinary common-law means of evidence instead of prescribing a statutory method.

It is claimed that, by an amendment enacted in 1901 (ch. 340), a classification of individuals was imported into the law which is false, because it excepts from the prohibitions and penalties thereof an entirely artificial class not distinguished

from other citizens by any characteristics germane to their fitness to practice pharmacy. This class so excepted by that act is described as "such persons of good moral character as, previous to the enactment of chapter 167 of the laws of Wisconsin for 1882, shall have had ten years' experience as pharmacists," etc. We confess that we have not yet discovered any reason which should except from examination a class of men who, twenty years ago, had ten years of experience not followed by subsequent practice. But it is not necessary for us to consider that question. The constitutionality of such an exception is of no materiality to the appellant's conviction. The law making it illegal to vend drugs or permit them to be vended by other than registered pharmacists in towns, cities, or villages of 500 population or over had persisted since 1882 and was in force in 1901 when the legislature attempted to make an exception in favor of this new class. If such an exception were beyond the power of the legislature, the only result would be its own invalidity. The legislature would merely have failed to establish immunity for such class, and the law would remain as it was before the attempt, under which appellant's offense and liability for penalty are the same as by the law if validly amended in 1901.

Error is assigned on the exclusion of the testimony of one Williams, a druggist and member of the Wisconsin State Board of Pharmacy, as to whether he saw any reason for discriminating between large and small communities. Such testimony was wholly inadmissible. The exercise of the power of legislation is by the constitution made dependent upon reasons which address themselves to the minds of those whom the people may choose as legislators, not on those which appeal to some particular druggist or some particular member of a state board. The question whether or not there can be any consideration to appeal to the mind of any reasonably intelligent person is a judicial one, solution of which is by

the constitution imposed upon the courts of the state. The fact that this particular witness had an opinion one way or the other was wholly irrelevant, and could neither control nor aid the court.

ERROR is also assigned on the exclusion of the question to appellant's son, whether "it would interfere with his [appellant's] practice as physician if his prescriptions cannot be put up at his own store." In this we think there was no error, for several reasons. In the first place, the provision of law within which counsel was attempting to bring his client is not that the act shall not be so construed as to interfere with the practice of a physician, but "not to interfere with any practicing physician from dispensing his own medicines or supplying his patients with such articles as may seem to him proper." Hence the question whether it might interfere with his "practice" was immaterial; and further, there was no pretense that the law, as construed by the trial court, prevented his prescriptions being put up in his own store. Apart from these considerations, however, it was expressly stipulated that the two acts charged in the complaint did not come within that exception, so of course it was immaterial whether the prohibition of some other acts might do so.

We are unable to say that the legislature exceeded its constitutional powers in any material part of the statute under which appellant has been found guilty, or that any error was committed by the trial court in reaching the judgment appealed from.

By the Court.—Judgment affirmed.

WISCONSIN RIVER LAND COMPANY, Respondent, vs. PAINE LUMBER COMPANY (LIMITED), Appellant.

December 8, 1906—January 8, 1907.

Ejectment: Cause of action: Pleading: Complaint: Demurrer: Tax titles: Limitation of actions.

1. On an appeal from an order overruling a demurrer to a complaint in ejectment the complaint is *held* to state a good cause of action.
2. Where in an action of ejectment the complaint sets out a cause of action based on a tax title, alleges all the facts required by sec. 3077, Stats. 1898, and is sufficient to entitle the plaintiff to recover, its sufficiency is not destroyed by additional allegations that the lands were "vacant and unoccupied" and "that the defendant claims title in fee simple to said lands."
3. Tax deeds on lands that had at all times been vacant and unoccupied had been recorded for upwards of three years prior to the time that plaintiff, grantee by mesne conveyances from the original tax-deed grantees, brought an action of ejectment. Plaintiff in its complaint pleaded the three years' statutes of limitation contained in secs. 1, 2, ch. 309, Laws of 1880, and secs. 1187, 1188, S. & B. Ann. Stats. and Stats. 1898. On demurrer that the cause of action alleged in the complaint was barred by the same three years' statutes of limitation, it was *held* that the plaintiff and its grantors were entitled to the protection of such statutes, and that the cause of action alleged in the complaint was not barred.

APPEAL from an order of the circuit court for Langlade county: JOHN GOODLAND, Circuit Judge. *Affirmed.*

This is an appeal from an order overruling the demurrer to the complaint, alleging in effect that during the times mentioned the plaintiff and the defendant were, respectively, corporations duly organized under the laws of this state, and that the plaintiff is the owner of and has an estate in fee simple in and to, and is entitled to the possession of, the premises therein described, situated in Langlade county. The plaintiff's title is based in part on, and derived from, the several tax deeds therein set forth, among others: (5) A

tax deed executed by the county clerk of Lincoln county to John Comstock October 12, 1881, and recorded October 14, 1881, for the delinquent taxes of 1873 and sale of 1874. (6) Another tax deed executed by the county clerk of Lincoln county to Thomas B. Scott May 7, 1883, and recorded May 11, 1883, for the delinquent taxes of 1876 and sale of 1877. (7) Another tax deed executed by the county clerk of Lincoln county to John Comstock June 13, 1881, recorded June 14, 1881, for the delinquent taxes of 1877 and sale of 1878. (8) Another tax deed executed by the county clerk of Lincoln county to John Comstock June 13, 1885, recorded June 18, 1885, for the delinquent taxes of 1881 and sale of May, 1882. (9) Another tax deed executed by the county clerk of Lincoln county to this plaintiff August 31, 1888, recorded September 1, 1888, for the delinquent taxes of 1884 and tax sale of 1885. The complaint further alleges:

"(10) That the aforesaid tax-deed grantees, other than the plaintiff, did, prior to the commencement of this action and for a valuable consideration, by due mesne conveyances, give, grant, convey, and transfer to plaintiff the said lands, and all of their rights, titles, and interests therein created by said tax deeds. (11) That at all the times when the assessments were made upon which the taxes and sales aforesaid were based the said lands were duly assessable and taxable by the towns and officers making such assessments and levying such taxes; that in each and every instance where a tax was levied as aforesaid, and a tax sale on account thereof was had as aforesaid, each such tax remained wholly unpaid and was duly returned delinquent to the proper county treasurer, and was duly offered and advertised for sale, and each such tax sale aforesaid was duly, legally, and properly conducted, and by reason thereof, when each and every such tax deed aforesaid was executed and delivered, the said lands were severally deedable, and the said proper officers of the county in which said lands were then situated were duly authorized to deed the same; that prior to the execution, delivery, and recording of each of said deeds none of the taxes upon which the tax sales aforesaid therein referred to were based were paid, nor

were any of such lands redeemed from such taxes before or after sale and before deeding, nor were any of the tax certificates upon which any of said tax sales or tax deeds were based, nor were any of the said tax deeds, ever canceled or set aside or annulled or avoided; that all the proceedings prior to and including the execution, delivery, and recording of said tax deeds were duly had and conducted. (12) That more than three years had, prior to the commencement of this action, elapsed since the recording of said tax deeds aforesaid, and each of them, and the plaintiff hereby pleads the three years' statutes of limitation contained in secs. 1, 2, ch. 309, Laws of 1880, and secs. 1187, 1188, S. & B. Ann. Stats. 1889 and Stats. 1898, and all acts and parts of acts amendatory to either or any of the aforesaid statutes, and of which they are amendatory or in codification, in support of said tax deeds and of its title thereunder. (13) That ever since the execution and delivery and recording of the said tax deeds aforesaid, and each and every of them, the said lands and all of them have been and now are wild lands and vacant and unoccupied. (14) That the defendant claims title in fee simple to said lands and unlawfully withholds, and for some time prior to the commencement of this action has unlawfully withheld, possession of said premises from the plaintiff, to its damage in the sum of $100, which the plaintiff claims. Wherefore plaintiff demands judgment against the defendant (1) for the possession of said premises; (2) for the sum of $100, plaintiff's damages for withholding thereof; (3) for the costs and disbursements of this action."

For the appellant there was a brief by *Thompson, Thompson & Pinkerton,* attorneys, and *Charles Barber,* of counsel, and oral argument by *Mr. A. E. Thompson* and *Mr. Barber.*

For the respondent there was a brief by *Reid, Smart & Curtis,* and oral argument by *E. M. Smart.*

CASSODAY, C. J. 1. Four grounds of demurrer are stated. Only two of them are discussed by counsel. One of the grounds so discussed is that the complaint does not state facts sufficient to constitute a cause of action. The statute prescribes what must be alleged in a complaint in an action of

ejectment. It must "set forth that the plaintiff has an estate or interest in the premises claimed," and "particularly state the nature and extent of such estate or interest, whether in fee," etc., "and that the defendant unlawfully withholds the possession thereof from him, to his damage such sum as he claims." Sec. 3077, Stats. 1898. This is, undoubtedly, an action in ejectment, and the complaint alleges all the facts thus required by the statutes. Counsel for the defendant concedes that "the plaintiff in its complaint has conclusively shown that it is the owner in fee simple of these lands by virtue of valid tax deeds duly issued to plaintiff's grantors, that the same were fair on their face and were duly recorded," and "that ever since the execution and delivery of said tax deeds the lands, and all of them, have been and still are wild lands, and vacant and unoccupied," and that "by a long line of decisions the plaintiff has therefore established that it is the legal owner of these lands and is in the constructive possession of the same,"—citing *Sprecher v. Wakeley,* 11 Wis. 432; *Hill v. Kricke,* 11 Wis. 442; *Knox v. Cleveland,* 13 Wis. 245. The contention seems to be that, although the complaint alleges all the facts thus required by the statute and sufficient to entitle the plaintiff to recover in ejectment, yet that its sufficiency is destroyed by reason of the additional allegations that such lands were "vacant and unoccupied" and "that the defendant claims title in fee simple to said lands." Counsel virtually concede that with those allegations stricken out the complaint would have satisfied all the calls of the statute. Assuming this to be so, still it was held by this court many years ago, on demurrer, that irrelevant or redundant matter in a complaint in ejectment did not destroy nor vitiate the facts well pleaded, nor change the nature and character of the action. *Riemer v. Johnke,* 37 Wis. 258, 261. Besides, the statute as amended also declares that "if the premises for which the action is brought are actually occupied by any person, such actual occupant shall be made de-

fendant in complaint; if they are not so occupied, the action must be brought against some person exercising acts of ownership on the premises claimed, or claiming title thereto or some interest therein, at the commencement of the action, or against the person in whom the title appears of record in the office of the register of deeds in and for the county in which said premises are located, at the commencement of the action." Sec. 3075, Stats. 1898; sec. 1, ch. 152, Laws of 1901; *Stephenson v. Doolittle,* 123 Wis. 36, 100 N. W. 1041; *Cypreanson v. Berge,* 112 Wis. 260, 263, 264, 87 N. W. 1081. We must hold that the complaint states a good cause of action in ejectment against the defendant.

2. The only other ground of demurrer discussed by counsel is that the cause of action alleged in the complaint is barred by the three years' statutes of limitation. Ch. 309, Laws of 1880; secs. 1187, 1188, S. & B. Ann. Stats. 1889 and Stats. 1898. The same statutes of limitation are alleged in the twelfth paragraph of the complaint as having run in favor of the plaintiff and its grantors for more than three years prior to the commencement of this action and since the recording of such tax deeds and each of them. The lands being vacant and unoccupied during the times alleged, there can be no question under the decisions of this court that the plaintiff and its grantors are entitled to the protection of such statutes of limitation. *Knox v. Cleveland,* 13 Wis. 245; *Dupen v. Wetherby,* 79 Wis. 203, 48 N. W. 378; *Gunnison v. Hoekne,* 18 Wis. 268; *Lawrence v. Kenney,* 32 Wis. 281. In this last case it was held:

"The grantee in a tax deed has the constructive possession of the land if actually unoccupied; and in such case, after the expiration of the time limited for an action by the former owner to test the validity of the tax deed, . . . the title and right of possession under the tax deed having become absolute, the grantee therein may maintain ejectment against any person thereafter taking possession adversely to such deed, and the bar of the statute does not apply to him."

In another case it was held:

"Under the statutes of 1849, the formal execution and record of a tax deed of unoccupied premises drew after it the possession, and made it incumbent on the previous owner, if he desired to contest its validity, to commence his action, or take actual adverse possession, within the period of limitation prescribed; otherwise, his right was gone." *Dean v. Earley,* 15 Wis. 100.

In another case it was held:

"Where the bar of the statute of limitation is complete in favor of the grantee in a tax deed, he has an absolute title to the land, which cannot be defeated by a statute subsequently enacted." *Lindsay v. Fay,* 28 Wis. 177. See, also, *Gates v. Parmly,* 93 Wis. 294, 313, 66 N. W. 253, 67 N. W. 739.

Other cases might be cited, but it is unnecessary. We must hold that the cause of action alleged in the complaint is not barred by the statutes of limitation.

By the Court.—The order of the circuit court is affirmed.

WILT, Appellant, vs. NEENAH COLD STORAGE COMPANY, Respondent.

December 8, 1906—January 8, 1907.

Appeal and error: Appealable orders: Order of reference: Jurisdiction of supreme court.

1. An order of reference involves the merits of the action and is reviewable on an appeal from the judgment under sec. 3070, Stats. 1898, but does not prevent a judgment from which an appeal may be taken, and hence is not reviewable under subd. 1, sec. 3069.
2. The right of appeal is statutory, and, where not given, an appeal in form does not confer jurisdiction.

APPEAL from an order of the circuit court for Shawano county: JOHN GOODLAND, Circuit Judge. *Dismissed.*

Action to recover on 135 causes of action, each being on

contract. All but eight were the same in the essential features as the second relative to the question of whether the cause, in the whole, was a proper one for a compulsory reference to hear, try, and determine. The second was to recover the reasonable value of a specified amount of milk alleged to have been furnished by a person named to the defendant between specified dates, the dealings being with one A. C. Werth, agent of the defendant and duly authorized in the matter, and the claim being assigned for a valuable consideration to the plaintiff before the commencement of the action. The other causes of action were each alleged to have been likewise assigned to the plaintiff. Each of four of them was to recover the agreed price for a specified amount of labor performed by a person named for the defendant at the request of its agent Werth. Each of three was to recover for merchandise alleged to have been sold to Werth as such agent. The remaining cause of action was to recover the agreed rent for a cheese factory, the dealings being with Werth as such agent. All allegations of the complaint, except that in respect to the corporate character of the defendant, were put in issue by the answer. An application was made for a compulsory reference of the whole case to hear, try, and determine the issues. It was opposed by the plaintiff, affidavits being presented to the effect that the main question in controversy was as to whether Werth was the agent of and authorized to bind defendant, as alleged in the complaint, and that in the event of such issue being decided against the latter it would consent to a reference to take the accounts, if any accounting was necessary, and that eight of the causes of action did not involve any accounting whatever. The application was granted and plaintiff appealed.

For the appellant the cause was submitted on the brief of *Eberlein & Eberlein.* They contended, *inter alia,* that before a court can order a reference against the consent of one of the parties it must appear and be clearly shown that the

examination of a long account is necessary, and the burden of proof is upon the party asking for the reference. *Knips v. Stefan,* 50 Wis. 286, 288; *Spence v. Simis,* 137 N. Y. 618; *Cassidy v. McFarland,* 139 N. Y. 201, 207; *Thayer v. McNaughton,* 117 N. Y. 111. Courts have often construed the term "account," and it has been uniformly held to mean an account in the ordinary acceptation of the term. *Willard v. Doran & W. Co.* 48 Hun, 402; *Untermeyer v. Beinhauer,* 105 N. Y. 521; *Merritt v. Virgelius,* 28 Hun, 420; *Druse v. Horter,* 57 Wis. 644. It is also a familiar rule that the account to be examined must not be collaterally involved, but must be the immediate object of the suit. *Camp v. Ingersoll,* 86 N. Y. 433; *Andrus v. Home Ins. Co.* 73 Wis. 642; *Thayer v. McNaughton,* 117 N. Y. 111; *Cornell v. U. S. Ill. Co.* 16 N. Y. Supp. 306; *Pawn v. Irwin,* 25 N. Y. Supp. 871. If a complaint contains two causes of action, one of which is clearly referable and the other not clearly referable, and in the second case, if it had been brought separately, the plaintiff would have been entitled to a jury trial, the whole issues should not be referred. The court should refer only the first cause of action which contains a referable issue, and thus give the plaintiff the benefit of a jury trial in the second cause of action. *Thompson v. Shepherd,* 9 Johns. 262; *Green v. Ames,* 14 N. Y. 225; *Peabody v. Cortada,* 21 N. Y. Supp. 680; *Reiser v. Plath,* 13 N. Y. Supp. 272. If independent issues are raised by the pleadings, or issues the determination of which may render an accounting unnecessary, they should first be tried in the proper forum, if in a common-law case before a jury, and if upon their determination an accounting is necessary they should then be referred to a referee to determine the same. *Malone v. St. Peters,* 172 N. Y. 279; *Leary v. Albany B. Co.* 72 N. Y. Supp. 657; *Best v. Pike,* 93 Wis. 408, 414; *Camp v. Ingersoll,* 86 N. Y. 433; *Andrus v. Home Ins. Co.* 73 Wis. 642.

[No brief on file for the respondent.]

MARSHALL, J. It is considered that the order is not appealable. The only part of the appeal statute where such orders are referred to is the first clause of subd. 1, sec. 3069, Stats. 1898. The order is one "affecting a substantial right made in an action." The second clause of such subdivision limits the right of appeal from such an order to cases where it "in effect determines the action and prevents a judgment from which an appeal might be taken." If such orders were appealable prior to the law of 1895 (ch. 212), it was under subd. 4, sec. 3069, R. S. 1878, which was repealed by such law. An order of reference involves the merits (*Cairns v. O'Bleness,* 40 Wis. 469; *Knips v. Stefan,* 50 Wis. 286, 6 N. W. 877), and so is reviewable on appeal from the judgment under sec. 3070, Stats. 1898, but it does not prevent a judgment from which an appeal may be taken. It will be found that in the instances where such an order has been reviewed in recent years there was an appeal from the final judgment. *Lyle v. Esser,* 98 Wis. 234, 73 N. W. 1008; *Johnson v. Goult,* 106 Wis. 247, 82 N. W. 139; *Jordan v. Estate of Warner,* 107 Wis. 539, 83 N. W. 946; *Parcher v. Dunbar,* 118 Wis. 401, 95 N. W. 370; *Hart v. Godkin,* 122 Wis. 646, 100 N. W. 1057.

Since appellant's counsel carefully briefed the question of whether the cause, under the circumstances, was a proper one for a compulsory reference, and expressed an earnest desire for a decision of that question instead of the judgment appealed from being reversed under the rule, because of respondent's failure to file a brief, we would certainly satisfy such desire if permitted to do so, instead of allowing the question to remain in the case undisposed of and so a probable source of future difficulty, but we are not so permitted. The right of appeal is statutory, and where not so given, an appeal in form does not confer jurisdiction upon this court.

By the Court.—The appeal is dismissed.

ROLOFF and another, Respondents, vs. FARMERS' HOME MUTUAL INSURANCE COMPANY OF THE TOWN OF ELLINGTON AND ADJOINING TOWNS, Appellant.

December 8, 1906—January 8, 1907.

Fire insurance: Fraud: Incumbrances: Evidence: Enhancing of risk: Duty of insurer.

1. In an action to recover for a loss under a policy insuring a cheese factory standing on leased ground, under the evidence, stated in the opinion, it is *held* that charges of intentional and fraudulent withholding of knowledge in relation to the title to the property, or of other facts which the insured knew, and knew to be material to the risk, were not sustained.
2. When an applicant for insurance has answered truthfully all questions submitted to him and has not suppressed any fact within his knowledge tending to enhance the risk, he has performed all that is required of him, and if more information is necessary to a full understanding of the risk it is the duty of the insurer to seek it, or at least to ask for it.

APPEAL from a judgment of the circuit court for Outagamie county: JOHN GOODLAND, Circuit Judge. *Affirmed.*

Suit for loss under an insurance policy, tried to the court. It appeared, without dispute, that the principal building destroyed was a cheese factory, built by one Armstrong upon certain premises leased to him for one dollar as long as he should maintain a cheese factory thereon, by one Conrad, and that some three years before the fire Armstrong had executed a contract, in the ordinary form of a land contract, providing that, upon completed payment, he would execute to plaintiff a full and clear title to the building by bill of sale, and at the same time had manually delivered to plaintiff his lease. Before the insurance was written the entire amount of this purchase price had been paid, but no bill of sale had been executed. The lease contained a prohibition against subleasing without the consent of Conrad, but it was testified by *Roloff* and disputed by Conrad that a verbal con-

sent was given at about the time the former purchased this building, after which he had spent large sums in addition and equipment. The application for the insurance stated that the property was not incumbered, and in response to question, "State the value of the whole property, including the land," stated, "Stands on leased ground." It was proved, without dispute, that both the defendant's agent and its president were informed, at the time of writing the insurance, that plaintiff did not own the ground on which the building stood, but that the same had been leased for that purpose by Conrad. Numerous defenses of arson, fraud in proofs, etc., were introduced by the two questions in the application above stated. The court found that there was no fraud therein, but that said answers were true, and accordingly rendered judgment in favor of the plaintiff, together with one *Jacquot,* who held a subsequently executed mortgage upon the building; from which judgment the defendant appeals.

For the appellant there were briefs by *Pierce & Lehr,* and oral argument by *J. E. Lehr.*

For the respondents there was a brief by *A. M. Spencer* and *A. C. Siekman,* and oral argument by *Mr. Spencer.*

DODGE, J. The reckless interposition of defenses involving charges of crime and fraud is not creditable to a corporation organized to supply indemnity to those unfortunate enough to lose their property by fire, where, as seems to be the case here, such charges have no foundation even, apparently, in the imagination of the defendant. The charges of arson in destruction of the property and of perjury in the proofs of loss have not been supported, nor sought to be, by the offer of a word of evidence of any sort. The remaining allegation of intentional and fraudulent withholding of knowledge in relation to the title of the property had apparently slightly more of good faith to excuse it. Plaintiff had stated in his application to the defendant's agent that the property

to be insured was not incumbered; that it stood on leased ground; that it was occupied by the owner; and that the same was a full exposition of all facts in regard to the condition, value, and risk of the property to be insured so far as known to the applicant and material to the risk. This statement was made to an agent who, as plaintiff was perfectly aware, had full knowledge that the ground belonged to one Conrad, that the building had been erected thereon by one Armstrong, under lease from Conrad, and that the same company had carried insurance thereon for Armstrong, and had twice insured the building for plaintiff after its transfer to him from Armstrong. The utmost diligence of counsel has been unable to suggest any untruth in the letter of these affirmative statements. Of course, both parties to the conversation understood that the property referred to was the building, and that was wholly unincumbered, except as any building erected by a lessee may be said to be incumbered by the rights of the landlord. The building was occupied by the owner, namely, the plaintiff, and the defendant's agent well knew that he, and not the owner of the ground, occupied it. It was on leased ground, as the agent had known, for many years, and as he communicated somewhat industriously by letter to the president of the company before the insurance was written. But was there any fraudulent concealment of other facts which the plaintiff knew, and knew to be material to the risk?

Here it is urged that, since the lease to Armstrong contained a prohibition against underleasing the premises without the consent of the owner and a provision that the latter might expel the lessee in such an event, plaintiff's occupancy was momentarily terminable by the landlord, and that this fact was one enhancing the risk. The evidence is well-nigh conclusive that plaintiff had no knowledge of any such situation. When Armstrong sold him the building he had also manually transferred to him the lease, and plaintiff, according to his own testimony, had notified the owner of the land

and obtained his consent to such assignment of right of possession. In this he is in some measure contradicted by Conrad, who, however, upon cross-examination, admitted a part of the conversation which he had first denied *in toto,* and admitted further and subsequent dealings with the plaintiff serving strongly to confirm the probability of latter's statement, so that we do not hesitate to hold that the evidence preponderates in its favor, although the trial court has not found specifically on that question. Obviously the transaction between Armstrong and *Roloff* evinced a purpose in both to transfer from one to the other the full term for which the land was occupied, for the sale of the building was absolute and complete. Whether such assignment could be effective at law without writing under the statute of frauds, a most persuasive case was presented for equity to declare and enforce it, for plaintiff had at once gone into possession on the faith of whatever oral agreement was made between him and Armstrong, had paid over $700 for the building, and had expended large sums in the improvement, enlargement, and equipment thereof. Certainly a claim by Armstrong to possession of the land would have been deemed fraudulent as against plaintiff. We cannot escape the conclusion that plaintiff had, by virtue of such conduct of Armstrong and the consent by Conrad, become assignee of said lease, and tenant according to its terms, so that his statement was strictly true, even construed as declaring that the ground was leased to him.

The evidence wholly fails to show that any facts were known to the plaintiff in any wise limiting his absolute title to this building or affecting the insurance risk thereon, except the one fact that he did not own the ground on which it stood, and that he communicated industriously in his application. If defendant was interested to know the terms of the lease or tenancy as affecting the value of plaintiff's interest in the building, the duty was upon it to inquire. When an applicant for insurance has answered truthfully all the questions

submitted to him and has not suppressed any fact within his knowledge tending to enhance the risk, he has performed all that is required of him. If more information is necessary to a full understanding of that risk, it is the duty of the insurer to seek it, or at least ask for it. *Alkan v. N. H. Ins. Co.* 53 Wis. 136, 141, 10 N. W. 91; *Dunbar v. Phenix Ins. Co.* 72 Wis. 492, 501, 40 N. W. 386.

By the Court.—Judgment affirmed.

HAAS, Respondent, vs. POWERS, Appellant.

December 8, 1906—January 8, 1907.

Appeal and error: Review: Absence of exceptions: Malicious prosecution: Probable cause: Evidence: Questions for jury: Defenses: Reliance on advice of counsel: Court and jury: Excessive damages.

1. In the absence of any exceptions to the charge of the court no question relating to instructions can be considered on appeal.
2. In an action for malicious prosecution based on the prior prosecution of plaintiff for larceny, it appeared that defendant failed to make full and fair disclosure of material facts in obtaining advice of attorneys, and under the inferences, supported by the evidence stated in the opinion, it was *held* that the question of defendant's liability in instituting the criminal proceeding maliciously and without probable cause was properly submitted to the jury.
3. In an action for malicious prosecution, the defense of having acted upon the advice of counsel is not available unless defendant fully and fairly stated the material facts and his knowledge of the transactions to counsel, and such advice led him to the honest belief that plaintiff was guilty of the offense of which he complained against him. If the evidence on this subject fails to establish such facts clearly and without dispute, then it must be left for decision to the jury.
4. In an action for malicious prosecution a verdict of $400, assessed as plaintiff's compensatory damages, under the facts is *held* not to be excessive.

APPEAL from a judgment of the circuit court for Outagamie county: JOHN GOODLAND, Circuit Judge. *Affirmed.*

In September, 1903, a highway was laid out over the line dividing the farms of plaintiff and defendant and continuing through land belonging to the defendant. A survey made in 1903 showed that the supposed line fence between their farms was in fact located wholly upon plaintiff's land. On February 12, 1904, the town officers notified defendant to remove his fences from the highway within thirty days. At this time he stated to the person so notifying him that there was no necessity of serving this notice upon him, because he had no fence to remove from this highway. About this time plaintiff was also notified to remove his fences from the highway, and during the winter he removed all of that part of the fence, save a few bottom rails covered with ice and snow, which had been treated as belonging to him and which he had kept in repair. The road overseer of the town had been ordered to open the road in August, 1904, and therefore during the summer he told various parties that they might take the wood and stumps from the fence in the highway. Among the persons he so told to take this material was the plaintiff. On August 19, 1904, the plaintiff took a wagon load of roots, stumps, and other parts of the material remaining of the fence which had been that part of the fence belonging to defendant. Defendant was not at home when plaintiff took this material. On the following day he consulted an attorney, told him that plaintiff had removed the fence material belonging to him, and stated generally the facts of the laying out of the highway and that he had maintained that part of the fence as a division fence. He did not state to the attorney the condition and value of the material taken by plaintiff; that the survey showed that the fence was upon plaintiff's land; that he had not removed it as directed; that the road district officers had been clearing it up as refuse and burning it, nor did he inform him that he had originally disclaimed

ownership of it when notified to remove it. Upon his statement he was advised that the taking by plaintiff was an act of larceny, and he was told to consult the district attorney of the county in respect to the matter. He went to the county seat, but the district attorney was out of town. He, however, consulted two other attorneys, and, with the assistance of one of them, procured the issuance, on his complaint, by a justice of the peace, of a warrant charging the plaintiff with the crime of larceny of a load of wood of the value of $4. Plaintiff was arrested, taken into custody, and compelled to obtain bail.

On August 22, 1904, plaintiff attempted to take more of this material from the fence, but he was stopped by the defendant after he had placed a few pieces of partially decayed wood on his wagon. Defendant states that, when his son attempted to prevent plaintiff and his son from taking the load of wood on August 19th, plaintiff's son told him that if they could not get the wood during the daytime they would get it at night. Defendant again consulted an attorney, the one whom he had first seen, and was told that there was nothing to do but to have the plaintiff arrested again, and was further advised to see the district attorney. Defendant sought the assistance of the district attorney in procuring another warrant, but the district attorney advised him that the first case would decide the matter, and told him that the proper remedy would be to get a peace warrant to prevent plaintiff from injuring his property. Defendant then consulted Justice Koch. He refused to issue a warrant until he had conferred with the district attorney. They talked the matter over, and as a result defendant procured the issuance of a peace warrant against plaintiff, based on his complaint that plaintiff threatened to commit a larceny of his fence material. Plaintiff was found not guilty by the jury on the trial for larceny upon the first complaint, and the second action was dismissed on motion of the district attorney. The second warrant was

issued before the first action had been tried. On the trial of the instant case the district attorney testified that the statement made to him by the defendant differed materially from the facts established by the evidence in the first action. He also testified that defendant insisted upon the issuance of the second warrant, and that he would not have aided plaintiff in procuring the first warrant if he had been consulted.

Plaintiff brings this action for damages, alleging that defendant instituted these criminal actions against him maliciously and without probable cause. There was evidence upon the trial that the wood was without any market value; that it was old and rotten and worth nothing above the labor of taking it away; that the road officers had been clearing it away by burning, and that defendant had treated it as worthless. It was also shown that the defendant had not informed the attorneys whom he had consulted of the condition and value of the material, that he permitted the road district officers to remove and burn it, and that it was located upon plaintiff's side of the division line between their farms. There was evidence that there had been trouble and litigation between the parties previously. The jury returned a verdict assessing plaintiff's damages at $500—$400 compensatory and $100 punitory damages.

This is an appeal from a judgment on the verdict in plaintiff's favor.

For the appellant there was a brief by *A. M. Spencer* and *Thomas H. Ryan,* and oral argument by *Mr. Spencer.*

For the respondent the cause was submitted on the brief of *John Bottensek,* attorney, and *G. T. Moeskes,* of counsel.

SIEBECKER, J. Whether the court correctly submitted the issues to the jury must be determined upon the state of the evidence. No question relating to instructions can be considered since the record presents no exception to the charge of the court.

The institution of criminal proceedings by the defendant against the plaintiff and plaintiff's acquittal of the charge preferred therein is unquestioned. The court submitted to the jury the question whether defendant instituted the criminal actions maliciously, without probable cause, and upon the advice of counsel. The jury found that defendant instituted them maliciously, without probable cause, and that he did not act upon the advice of counsel in instituting them. Upon this question it appeared that he failed to make a full and fair disclosure of material facts in obtaining advice. The evidence also tended to support inferences, which the jury were permitted to find, that the old fence material was of no value at the place in the newly established highway from which plaintiff was accused of stealing it; that defendant had expressly disclaimed any interest in it and had left it to be removed by the road overseer; that the overseer had told the plaintiff and others that they might remove it; and that he had been and was then engaged in burning portions of it to clear it from the highway. It also appeared that an unfriendly feeling existed between the parties, and that this feeling had been intensified through alleged trespasses of defendant's cattle on plaintiff's premises and had resulted in litigation between them. Under evidence sustaining such inferences it is apparent that the trial court held upon good ground that the question of defendant's liability in instituting these criminal proceedings against plaintiff maliciously and without probable cause should be submitted for determination to the jury. *Eggett v. Allen,* 119 Wis. 625, 96 N. W. 803.

Respecting the defense that defendant acted upon the advice of counsel, circumstances already considered have a bearing. To rest upon this defense requires that the defendant sought such advice and followed it in good faith. To fulfil such requirements it must appear that he fully and fairly stated the material facts and his knowledge of the transaction to counsel, and that such advice led him to the

honest belief that plaintiff was guilty of the offense of which he complained against him. If the evidence upon this subject fails to establish such facts clearly and without dispute, then it must be left for decision to a jury. *Messman v. Ihlenfeldt,* 89 Wis. 585, 62 N. W. 522; *Small v. McGovern,* 117 Wis. 608, 94 N. W. 651; *Cullen v. Hanisch,* 114 Wis. 24, 89 N. W. 900; *Schattgen v. Holnback,* 149 Ill. 646, 36 N. E. 969. The evidence is not without dispute, and does not clearly show that defendant met these requirements. The evidence shows that he omitted to state to the counsel whom he consulted that the material which he claimed plaintiff had stolen had no market value in its decayed condition where it lay in the highway, that he had taken the portion that was good, that the part which he had left and which was taken might be deemed to have been abandoned by him, and that the overseer, in clearing out the newly established highway, was engaged in burning it as abandoned and worthless rubbish; nor did he state that he and plaintiff had had recent difficulties and litigation concerning this line fence and trespasses committed by his cattle on plaintiff's land. Another material fact bearing upon this issue is the conflict between his evidence and that of the district attorney respecting the second prosecution. The district attorney claims to have advised him that the second prosecution ought not to be instituted until the first action had been tried, but he states that defendant persisted in commencing it before the trial of the pending action. Upon this state of the evidence and the consideration of defendant's want of good faith in this transaction, it is manifest that this issue was properly submitted to be resolved by the jury.

The jury assessed plaintiff's compensatory damages at $400. This sum cannot be held excessive under the facts. *Billingsley v. Maas,* 93 Wis. 176, 67 N. W. 49.

By the Court.—Judgment affirmed.

CUSTARD, Respondent, vs. WIGDERSON, imp., Appellant.

December 8, 1906—January 8, 1907.

Appeal and error: Direction of verdict: Conflict of evidence: Bankruptcy: Discharge: Collateral attack: Failure to schedule debt: Mistake in spelling name of creditor.

1. It is error to direct a verdict upon conflicting testimony.
2. Where a discharge in bankruptcy is in due form, whether the proceedings in the bankruptcy court upon which the discharge is based are regular or not cannot be questioned collaterally.
3. In an action on a note given to plaintiff "A. Custard" before the defendant was discharged under the federal bankruptcy act, it appeared, among other things, that a claim was scheduled in the bankruptcy proceedings under the name of "A. Castard." *Held*, under sec. 17, ch. 541, 30 U. S. Stats. at Large (providing that a discharge in bankruptcy shall release a bankrupt from all of his provable debts except such as have not been duly scheduled), that the debt to "A. Custard," the plaintiff, who had no notice or actual knowledge of the bankruptcy proceedings, was not scheduled by the appearance in the schedules of the name of "A. Castard" as a creditor, and was not discharged.

APPEAL from a judgment of the circuit court for Langlade county: JOHN GOODLAND, Circuit Judge. *Affirmed.*

This action was brought to recover upon two promissory notes for $100 each, executed and delivered by defendants to plaintiff. The notes bore date June 25, 1897, and were payable one four and the other five months after date, with interest at eight per cent. after due. The complaint was in the usual form. The defendant M. Wigderson was held not liable because the wife of defendant *E. Wigderson* and not bound by the contract. The defendant P. Roman was not served with process, so the controversy here is between the plaintiff and appellant, *E. Wigderson.* The appellant answered the plaintiff's complaint, admitting the execution of the notes, but pleaded as a defense his discharge in bankruptcy. The plaintiff sought to recover on two grounds, namely: (1) That subsequent to the alleged discharge appel-

lant promised to pay the notes, the promise being made to the plaintiff as well as to his attorney; and (2) that the appellant's alleged proceedings in bankruptcy were so defective as to constitute no defense. The case was tried by the court and a jury, and after the evidence was all in the court directed a verdict for plaintiff for the amount claimed in the complaint, with costs. Appellant moved to set the verdict aside and for new trial, which motion was denied. Judgment was entered upon the verdict, and the defendant *E. Wigderson* appealed, and assigns error.

For the appellant the cause was submitted on the brief of *Foster & Morson,* and for the respondent on that of *F. F. Wheeler.*

KERWIN, J. The errors complained of on this appeal may be classified under two heads: First, whether the court erred in directing a verdict for plaintiff; and, second, whether the bankruptcy proceedings constituted a defense to the notes in suit.

1. There is a sharp conflict in the evidence as to whether or not the appellant promised, after the bankruptcy proceedings, to pay the notes, the respondent and his attorney testifying that such promise was made. The appellant flatly denies such promise. So whether or not a promise was made to pay the notes, as contended by plaintiff, was clearly a question for the jury. It is therefore obvious that the court below must have directed a verdict upon the ground that the alleged bankruptcy proceedings constituted no defense. This seems clear from a remark of the trial judge appearing in the record. It is very clear that, if the bankruptcy proceedings were a defense, the court erred in directing a verdict for the plaintiff upon the conflicting testimony. This brings us to a consideration of the question of the effect of the bankruptcy proceedings, and whether error was committed in holding that such proceedings constituted no defense.

The appellant set up in his answer the order of discharge in bankruptcy, and, after plaintiff had closed his case, put such order in evidence; also offered in evidence the petition and schedule of creditors, which included the name "A. Castard," together with residence Waupaca, Wisconsin, amount $200, contracted at Waupaca, Wisconsin, consideration money borrowed, note given dated 1897. The appellant also offered to prove that the "A. Castard" mentioned in the schedule was intended to be the plaintiff, and scheduled as a creditor, and that the spelling of the name "Castard" instead of "Custard," in the schedule, was a clerical error. On rebuttal plaintiff put in evidence a certified copy of appellant's petition in bankruptcy proceedings, for the purpose of showing that such petition failed to state residence or domicile for six months preceding the filing of petition, and also failed to state occupation; also offered in evidence certified copy of verification to said petition, for the purpose of showing that the verification was taken before appellant's attorney in the bankruptcy proceedings; also offered in evidence certified copy of schedule of creditors, for the purpose of showing that the schedule was not properly verified, and that the name *A. Custard,* plaintiff, does not appear, and that the amount of indebtedness, or date of same, is not given; also offered certified copy of entire record in bankruptcy proceedings, except the order of discharge.

The respondent attacks the bankruptcy proceedings substantially upon the following grounds: (1) That the petition in bankruptcy is so jurisdictionally defective that no valid discharge could be granted; (2) that the indebtedness of appellant to respondent was never scheduled; (3) that no notice that appellant had been adjudged a bankrupt and of the first meeting of creditors was given by the referee or clerk; (4) that no copy of petition asking for discharge of appellant, and the order based thereon, were sent to or received by respondent; (5) that appellant signed and swore to his petition before his attorney in bankruptcy.

It does not appear from the record that the appellant was not a resident and domiciled in the district where the discharge in bankruptcy was granted; but it is contended that the petition is defective in failing to properly state the residence and domicile of the appellant and in not being properly verified. We think, however, that these questions cannot be reviewed here. The decree of discharge is in due form, and whether the proceedings in the bankruptcy court upon which this decree is based are regular or not cannot be questioned collaterally. The decree is made by the Bankrupt Act itself evidence of the regularity of the proceedings and the jurisdiction of the court to render the decree. Ch. 4, sec. 21, subd. "f," of the Bankrupt Act of 1898 [Act July 1, 1898, ch. 541, 30 U. S. Stats. at Large, 552; U. S. Comp. Stat. 1901, p. 3431] provides, in effect, that a certified copy of the order granting a discharge shall be evidence of the jurisdiction of the court, the regularity of the proceedings, and the fact that the order was made. The order of discharge, therefore, having been put in evidence, was proof of the appellant's discharge in bankruptcy, and cannot be impeached collaterally. This provision of the Bankrupt Act, making the order of discharge evidence of the jurisdiction of the court and the regularity of the proceedings, was obviously intended to dispense with proof of antecedent steps in the proceedings. The decisions under the Bankruptcy Act of 1867 [Act March 2, 1867, ch. 176, 14 U. S. Stats. at Large, 517] are not entirely uniform on the question of collateral attack, although the weight of authority appears to be that a discharge was not subject to attack collaterally under the act. Collier, Bankr. (5th ed.) 192; Brandenburg, Bankr. (3d ed.) § 398, and cases cited in note. So, too, it has been held that, where provision is made in the bankruptcy court for setting aside the decree of discharge, this proceeding is exclusive. Brandenburg, Bankr. (3d ed.) § 397, and cases cited; Collier, Bankr. (5th ed.) 192, 193. This court has held that a discharge in bankruptcy cannot be attacked collaterally. *Thomas v. Jones,*

39 Wis. 124. In the case before us it is clear that the order of discharge is not open to attack. Brandenburg, Bankr. (3d ed.) § 398; Collier, Bankr. (5th ed.) 192, 193; 1 Black, Judgm. § 248; *In re Shaffer,* 104 Fed. 982; *Commercial Bank v. Buckner,* 20 How. 108; *Michaels v. Post,* 21 Wall. 398; *Black v. Blazo,* 117 Mass. 17; *Rayl v. Lapham,* 15 N. B. R. 508; *Howland v. Carson,* 16 N. B. R. 372; *Thomas v. Jones, supra; Osborn v. Dobrinz,* 85 Wis. 252, 55 N. W. 403.

2. But, while the order of discharge cannot be attacked, a more serious question arises as to whether the debt of the respondent sued upon was discharged by the bankruptcy proceedings. Under the bankruptcy law of 1867 this court held, in harmony with the general current of authority, that a debt was discharged even though not scheduled. *Thomas v. Jones, supra; Osborn v. Dobrinz, supra.* But it will be seen that under the act of 1867 debts not scheduled were not excepted from the operation of discharge, while under the Bankruptcy Act of 1898 they are. Sec. 17 of the Bankruptcy Act of 1898 provides that a discharge in bankruptcy "shall release a bankrupt from all of his provable debts, except such as . . . have not been duly scheduled. . . ." This provision is a marked departure from former bankruptcy acts, and decisions under such acts, to the effect that scheduling was not necessary in order to bring the debt within the order of discharge. The words of the present act, however, are plain and unambiguous, and there can be no doubt that they mean what they say; and, if so, unless the debt is duly scheduled in time for proof and allowance, or the creditor had notice or actual knowledge of the proceedings in bankruptcy, it is not affected by the discharge. The evidence shows that the respondent had no notice or actual knowledge of the bankruptcy proceedings, and therefore, if the debt was not duly scheduled, it is not affected by the bankruptcy proceedings. Sec. 17, Bankr. Act 1898; Collier, Bankr. (5th ed.) 214.

So far as the courts have spoken upon the subject since the Bankruptcy Act of 1898, they hold that extreme exactness must be used in scheduling the creditors by name in the bankruptcy proceedings. Collier, Bankr. (5th ed.) 214; Brandenburg, Bankr. (3d ed.) § 216, and note; *Liesum v. Kraus,* 35 Misc. 376, 71 N. Y. Supp. 1022; *Columbia Bank v. Birkett,* 174 N. Y. 112, 66 N. E. 652, 9 Am. B. R. 481; *Birkett v. Columbia Bank,* 195 U. S. 345, 25 Sup. Ct. 38; *In re Mackey,* 1 Am. B. R. 593, 596; *Westheimer v. Howard,* 93 N. Y. Supp. 518, 14 Am. B. R. 547; *Haack v. Theise,* 99 N. Y. Supp. 905, 16 Am. B. R. 699. An examination of the foregoing cases will show that courts have held to a strict rule in requiring debts to be duly scheduled in accordance with the provisions of the act.

In *Liesum v. Kraus, supra,* the creditor's name was George Liesum and was scheduled "George Liesman," and it was held that the debt was not discharged because the name was not properly entered in the schedule. In *Haack v. Theise, supra,* the name of the creditor James Haack was scheduled "James Haack and wife," and ditto marks were used to indicate residence, and the court held that the debt was not duly scheduled. The court said:

"These features of the present act, when contrasted with the provisions of preceding acts, indicate a legislative intent that greater strictness shall prevail in notifying the creditor of the various proceedings in bankruptcy."

In *Columbia Bank v. Birkett,* 174 N. Y. 112, 66 N. E. 652, 9 Am. B. R. 481 (affirmed in 195 U. S. 345, 25 Sup. Ct. 38), the court said:

"In my opinion there are features in the present bankruptcy act which differentiate it from preceding acts, and which indicate a legislative intent that greater strictness shall prevail in notifying the creditor of the various proceedings in bankruptcy."

Subd. 8, sec. 7, of the Bankruptcy Act of 1898 [Act July 1, 1898, ch. 541, 30 U. S. Stats. at Large, 548; U. S. Comp.

Stat. 1901, p. 3425] provides that the schedule shall contain a list of the bankrupt's creditors, "showing their residences, if known, if unknown, that fact to be stated, the amounts due each of them, the consideration thereof, the security held by them, if any. . . ." Under the strict rule which prevails respecting the scheduling of debts by the bankrupt, we think it clear that the debt of *A. Custard* was not duly scheduled, within the meaning of the Bankruptcy Act, by the appearance of the name "A. Castard" in the schedule. Therefore, since *A. Custard,* respondent, had no notice or actual knowledge of the bankruptcy proceedings, the debt sued upon was not discharged, and the judgment of the court below, therefore, must be affirmed.

By the Court.—Judgment affirmed.

BOESEN, Appellant, vs. PETERSON, Respondent.

December 8, 1906—January 8, 1907.

Costs: Actions to enforce mechanics' liens.

1. The statute authorizing trial courts to allow partial costs in their discretion in equitable actions applies to actions to enforce mechanics' liens.
2. Where, in an action to enforce a mechanic's lien, the court allowed but $10 for costs and disbursements, it was *held* that the circumstances shown by the record did not so clearly show abuse of discretion as to warrant reversing the action of the trial court.

APPEAL from a judgment of the circuit court for Langlade county: JOHN GOODLAND, Circuit Judge. *Affirmed.*

For the appellant the cause was submitted on the brief of *Goodrick & Goodrick,* and for the respondent on that of *Foster & Morson.*

WINSLOW, J. This is an action to foreclose a mechanic's lien for $24.30 in which the plaintiff obtained judgment. The court allowed but $10 for costs and disbursements, and the plaintiff appeals from that part of the judgment refusing to allow a full bill of costs. The case is practically ruled by *Charles v. Godfrey,* 125 Wis. 594, 104 N. W. 814, in which it was held that the statute authorizing trial courts to allow partial costs in their discretion in equitable actions applies to mechanic's lien actions. It is urged that in the present case the discretion was abused, but we have been unable to reach the conclusion that the circumstances so clearly show abuse of discretion as to warrant the court in reversing the action of the trial court.

By the Court.—Judgment affirmed.

STEINBERG and another, Respondents, vs. SALTZMAN and wife, Appellants.

December 8, 1906—January 8, 1907.

Appeal and error: Appealable orders: Action to recover real property: Ejectment or suit in equity? Pleading: Fraud: Matters of public record: Executors and administrators: Appointment: Validity: Collateral attack: Laches: Infants.

1. An order striking out a demurrer as irregular is not appealable.
2. If a person has the legal title to lands and is entitled to the possession thereof as against another wrongfully withholding the same, and such person's right involves fraud on the part of such other, which right must be established by evidence *aliunde* the record, such person may sue in ejectment for his vindication though he may also sue in equity.
3. In pleading fraud the facts in respect to the matter should be stated.
4. In pleading a matter relating to the existence or nonexistence of a public record the truth of which is readily ascertainable, allegations in respect thereto on information and belief are not sufficient.

5. When a cause for administering the estate of a deceased person exists and application is made therefor to the proper court, neither the circumstance that it is not made by a person entitled to the administration or that a person not so entitled is appointed so far vitiates the proceedings as to render the appointment wholly void; it is voidable, only by some appropriate direct proceeding, not by collateral attack.
6. When a person more than twelve years after arriving at his majority invokes equity jurisdiction for relief from acts which occurred more than twenty-five years prior thereto, his pleading should state some reasonable excuse for the delay

[Syllabus by MARSHALL, J.]

APPEAL from orders of the circuit court for Shawano county: JOHN GOODLAND, Circuit Judge. *One order affirmed; the other appeal dismissed.*

The following shows so much of the complaint as is necessary to be considered:

Carl Steinberg died intestate July 6, 1878, leaving a widow, *Emelie Steinberg,* and three children by a former wife, two being the plaintiffs in this action and the other named Wehilm Steinberg. The latter before the commencement of this action duly transferred his interest in the lands hereinafter described to the plaintiffs and they now own the same. When Carl Steinberg died his son *David* was five years old and his daughter *Martha* was six years old. The widow *Emilie* and the children were the only next of kin and heirs at law of the deceased. He left the north half (N. ½) of the southeast quarter (S. E. ¼) of section twenty-two (22), township twenty-seven (27), range thirteen (13) east, in Shawano county, Wisconsin, the northeast quarter (N. E. ¼) of the southeast quarter (S. E. ¼) being his homestead upon which the family resided. He also left personal property of the value of about $600 or $700 and debts to the amount of $400 or $500. The value of the estate was about $1,500. Shortly after he died Gottlieb Saltzman presented to the probate court of Shawano county a petition for administration

of the estate, which was the only petition ever filed in the matter, and was in the following words:

"The petition of Gottlieb Saltzman of said county, respectfully represents that Carl Steinberg, late of the town of Seneca, Shawano county, and state of Wisconsin, on the 6th day of July, 1878, at the city of New London, Waupaca county, Wisconsin, died intestate, as your petitioner believes; no last will or testament having been found or being known to exist. That the said deceased left a widow (*Emelie Steinberg*) and three children by a former wife, viz.: Wehilm, aged eight years; *Martha,* aged six years; and *David* of the age of five years, who with said wife constitute the family of said deceased.

"That said deceased left goods, chattels, and personal property within the county and state to the probable amount of five hundred dollars, as your petitioner is informed and believes. That said deceased, as your petitioner is informed and believes, left real estate to the probable amount of eleven hundred dollars. That said deceased left debts due and unpaid to the probable amount of six hundred dollars.

"Your petitioner also represents that he is half-brother to the said deceased Carl Steinberg.

"Your petitioner being desirous that the estate of the said deceased be legally administered, would pray that administration thereof be granted unto Herman Kleman of said town of Seneca, and in the county and state aforesaid, and that appraisers be appointed pursuant to the statutes in such cases made and provided according to the rules and practice of this court. G. SALTZMAN."

It was verified.

The probate court ordered a hearing on such petition and November 25, 1878, granted the same and the administrator appointed, in form, qualified as such, and thereafter proceeded to sell and dispose of the estate. Plaintiffs allege on information and belief that he disposed of the property for an inadequate consideration and did not attempt to obtain the full value therefor and that defendants received the greater part thereof for a grossly inadequate consideration, the transac-

tion being for the purpose of defrauding the children of the deceased. April 4, 1879, after disposing of the personal property, the administrator made application to the probate court for leave to sell the real estate. The following is the only petition in that regard filed in the matter: (It was verified, but that part we omit.)

"The petition of Herman Kleman respectfully represents, that the total amount of personal estate that has come to his hands as administrator is the sum of one hundred ninety-three dollars. That said amount has been disposed of in paying the expense of administration, the necessary funeral expenses, and part of the debts of said deceased.

"That the debts now outstanding and unpaid against the estate of said deceased amount to about the sum of five hundred dollars, as your petitioner believes.

"That the said deceased died seised of the following described real estate, situate, lying, and being in the county of Shawano and state of Wisconsin, to wit: The north half of the northeast quarter of section twenty-two, township twenty-seven, range thirteen east; eighty acres.

"That it was necessary to sell all of said real estate in order to pay said debts, and your petitioner would therefore pray that a license be to him granted to sell the all of said real estate and he will forever pray.

"Dated at Seneca, the 4th day of April, 1879.

"H. KLEMAN, Administrator."

Plaintiffs allege on information and belief that no license or authority to sell said real estate was granted by the probate court, but that nevertheless the administrator, August 7, 1879, as such, sold and conveyed the same to *August Saltzman* for the expressed consideration of $1,300, but plaintiffs allege on information and belief that no part of such consideration was paid. Before such sale said *Emelie Steinberg* was married to the defendant *August Saltzman*. After the disposal of all of the property aforesaid the administrator filed, in form, an account of his administration in the probate court, showing payment to the widow of the deceased a large

share of the estate after her marriage aforesaid, and a large amount of money paid for purposes and uses unauthorized by law and unwarranted by the circumstances, and a balance in his hands of $350. The said balance has not been paid to the heirs nor have they received any benefit therefrom. The administrator, Gottlieb Saltzman, and others unlawfully and fraudulently conspired with the defendants to cheat and defraud the plaintiffs out of their rightful inheritance, the same being the property aforesaid. The children of the deceased were kept by defendants until they were of age, or nearly so, in ignorance not only of their father's estate, but of all matters in relation thereto, and without education. They were unable to speak English to any extent and were isolated upon the farm and not permitted to mingle with outside people, and great pains were taken to keep them in total ignorance of their father's estate and of their rights. They did not know or have any knowledge or information in regard thereto until June, 1905, when they were informed of the situation and immediately commenced an investigation of the same. The defendants claim title to the land mentioned under the deed aforesaid and are, and for many years have been, in possession of the same and in the enjoyment thereof, to the injury of the plaintiffs, and refuse to surrender their possession to the plaintiffs or to account to them. Plaintiffs pray judgment that the deed aforesaid be declared void; that plaintiffs' title to the land be affirmed; that defendants be barred from any right thereto, and that plaintiffs have such other relief as to the court may seem just.

The defendants demurred to the complaint (1) for defect of parties defendant, (2) for want of jurisdiction of the court of the subject of the action, (3) for misjoinder of causes of action, (4) for insufficiency of facts stated to constitute a cause of action. The demurrer was overruled with leave to the defendants to answer within twenty days upon payment of $10 costs. Within such time the terms were

complied with and a second demurrer was served, stating the same grounds as before with the additional ground that the action was not commenced within the time limited by law; the following sections of the Statutes of 1898 being referred to: Sec. 4221, subd. 4, and secs. 4233, 4251, 4207, 4211, and 3918. Such demurrer on motion was stricken out as frivolous, the order in that regard being as follows:

"It is ordered: That the said second demurrer was irregularly interposed for the reason that a former demurrer covering the same grounds with the exception of setting up the statute of limitations (the question of laches having been fully argued on the argument of the first demurrer), which demurrer was overruled with leave given the defendants to answer within twenty days on payment of ten dollars costs; said second demurrer having been interposed without leave of court although the above-named ten dollars having been paid and retained by plaintiffs' attorney, and he having admitted due and personal service upon said second demurrer, but plaintiffs' attorney offering in open court to repay said ten dollars to defendants' attorneys while arguments were in progress, which defendants' attorneys refused to accept.

"It is further ordered that defendants have twenty days in which to answer without costs.

"Dated this 26th day of June, 1906.

"JOHN GOODLAND, Circuit Judge."

The defendants appeal from both orders.

For the appellants the cause was submitted on the brief of *Eberlein & Eberlein,* and for the respondents on that of *John F. Hooper.*

MARSHALL, J. The order striking out the second demurrer is not appealable, not being specified as such in the appeal statute (sec. 3069, Stats. 1898). That is ruled by *Gianella v. Bigelow,* 92 Wis. 267, 65 N. W. 1030, and *Jacobs v. Beebe,* 95 Wis. 389, 70 N. W. 468.

Appellants' counsel suggest that if the county court failed to obtain jurisdiction to appoint Herman Kleman adminis-

trator, as respondents' counsel contend, then since the complaint shows that appellants are in possession of the property respondents' remedy is by an action in ejectment. The answer to that is that where a person claims the legal title to land and right of possession as against another, unjustly withholding the same, if such person in order to prove his title must resort to evidence *aliunde* the record, and facts showing fraud on the part of his adversary, he may sue in equity, though he might, if he choose, sue at law. *Burrows v. Rutledge,* 76 Wis. 22, 44 N. W. 847; *Swihart v. Harless,* 93 Wis. 211, 67 N. W. 413; *Gibson v. Gibson,* 102 Wis. 501, 78 N. W. 917.

The further claim is made that the allegations of the complaint on the question of fraud are mere general statements; not complying with the rule that the facts claimed to constitute the fraud, not mere conclusions, must be pleaded. *Riley v. Riley,* 34 Wis. 372; *Crowley v. Hicks,* 98 Wis. 566, 74 N. W. 348. That claim does not appear to be well taken to the extent of rendering the pleading open to attack for insufficiency. It states facts showing that a person, not entitled as matter of right to administration, was appointed to the trust; that he disposed of the personal property of the estate for an inadequate consideration, most of it going to the appellants; that the real estate including the homestead, which was not liable to sale for the payment of debts, was sold for that purpose without any license authorizing the same; that such acts and others mentioned were done in consummation of a conspiracy between the administrator, the person who petitioned for his appointment, and the appellants to cheat respondents out of their property, and that appellants concealed the facts of the matter from respondents for many years and during their minority by isolating them on a farm, bringing them up in ignorance and preventing them from associating with outside people. Whether the allegation on information and belief that no license to sell

the real estate was obtained is sufficient under *Union L. Co. v. Chippewa Co.* 47 Wis. 245, 2 N. W. 281, to raise that question because it appertains to matters of public record is not controlling in face of the other allegations. On the whole, though some of the allegations of the complaint on the subject of fraud are quite general, it seems that facts in respect to the matter are sufficiently pleaded to save the pleading from the charge of insufficiency.

It is contended by respondents that the petition for administration was fatally defective because not made by a person entitled to administration, and that the order of appointment is void because the person named as administrator was not entitled thereto, so far as appears by the petition, under sec. 3807, Stats. 1898. The rule in Michigan under a statute similar to ours is as counsel contend. However, this court has never given countenance thereto. It was held in *Brunson v. Burnett,* 2 Pin. 185, that the appointment of a person as administrator, not entitled thereto by law, "was, in the highest degree, irregular, though not perhaps entirely void." That decision has stood without criticism for over fifty years. The suggestion that such an appointment is probably erroneous only, has doubtless been relied upon time and again since the decision was made, till it has come to be understood that mere failure to state in the petition for administration all facts requisite to entitle the person named as administrator to the appointment, sufficient being shown to indicate that a cause for administration exists and that the application is in the proper jurisdiction, or failure to appoint as administrator a person designated by the statutes, is not such a defect as to render the administration proceedings initiated by the petition wholly void. That is supported by *Taylor v. Hosick,* 13 Kan. 518, where letters of administration were issued to a person not a relative, contrary to the statute, and *Kelly v. West,* 80 N. Y. 139; *Maybin v. Knighton,* 67 Ga. 103; *Barclay v. Kimsey,* 72 Ga. 725; *Emerson*

v. Ross's Ex'x, 17 Fla. 122; *Martin v. Robinson,* 67 Tex. 368, 3 S. W. 550; *Varnell v. Loague,* 9 Lea, 158; *Moreland v. Lawrence,* 23 Minn. 84; *Pick v. Strong,* 26 Minn. 303, 3 N. W. 697; *Emery v. Hildreth,* 2 Gray, 228; *Mut. Ben. L. Ins. Co. v. Tisdale,* 91 U. S. 238.

Our latest decisions touching the subject are in harmony with *Brunson v. Burnett* and the cases cited. In *Welsh v. Manwaring,* 120 Wis. 377, 98 N. W. 214, failure to appoint as administrator one competent therefor by statute was treated as judicial error, and in *Perkins v. Owen,* 123 Wis. 238, 101 N. W. 415, the appointment of an administrator where it turned out later that no such appointment was necessary because of there being a will was likewise treated. The same principle was approved in *Jordan v. C. & N. W. R. Co.* 125 Wis. 581, 104 N. W. 803, where the following language of MARSHALL, C. J., in *Griffith v. Frazier,* 8 Cranch, 9, 23, was cited with approval:

"In the common case of intestacy it is clear that letters of administration must be granted to some person by the ordinary [having the power of our county court], and, though they should be granted to one not entitled by law, still the act is binding until annulled by the competent authority, because he had power to grant letters of administration in the case."

In *Pick v. Strong, supra,* the court passed upon the identical question we have here in this decisive language:

"The letters of administration were introduced on the trial. They were, in this action, conclusive of the regularity of the proceedings resulting in their issuance. That they were issued to one not entitled to them, or upon the application of one who had no right to make such application, is an objection which could be made only on appeal from the order granting them, or, if such application could be made, upon an application to the probate court to vacate them. They cannot be attacked for such reasons in a collateral proceeding."

The only case of any significance to the contrary of the foregoing except those decided by the supreme court of Michigan, so far as we can discover, is *Underwood v. Underwood's Adm'r,* 111 Ky. 966, 65 S. W. 130. The opinion of the court there is very brief and without supporting authorities. There is a very able dissenting opinion wherein *Brunson v. Burnett,* 2 Pin. 185, is given first place in support of the principle maintained. The learned judge gave expression to his views thus:

"No authority is cited by the court to sustain the conclusion it reaches, which is in conflict with all the authorities that I have been able to find. If the order of the county court in this case is void, then the sureties of the public administrator were not responsible for his acts in administering the estate, and sales by him passed no title, for if the order was void he stood as if he had taken charge of the estate without any order of court; and much graver consequences may, it seems to me, result from the rule laid down by the court than from that which the lawmaking branch of the government has seen proper to prescribe. . . . In all the states or nearly all, provision is made for administration by a public officer, and nowhere, so far as I have been able to find, has departure by the probate court from the directions of the statute been held to make its order void."

And also this:

"The universal current of authority is that in such matters the judgments of the county courts cannot be attacked collaterally unless the person upon whose estate administration is granted was not in fact dead or did not reside in the county."

The allegations of the complaint on information and belief challenging the validity of appellants' title upon the ground that no license to sell the realty was granted, it is insisted, are not sufficient to raise such question. That seems to be ruled in appellants' favor by *Union L. Co. v. Chippewa Co.* 47 Wis. 245, 2 N. W. 281; *State v. McGarry,* 21 Wis. 496; *Mills v. Jefferson,* 20 Wis. 50. Respondents could easily have ascertained whether there was a record of any license to sell the

realty, and, if there was none, have alleged the fact positively. That would have been warranted.

Counsel for appellants further contend that the allegation of the complaint that part of the realty was not liable for the payment of debts because of its being a homestead, which upon the facts stated under the statute descended to respondents free from the claims of creditors, is immaterial, since sec. 3884, Stats. 1898, existed at the time of the sale and authorized a sale of the homestead with other lands if the whole was incumbered by a mortgage, and that it should be presumed that such condition existed, since it is not negatived by the complaint. If any such negative was required it seems that the copy of the petition for the sale, which was made a part of the complaint and shows no special circumstances satisfying the statute referred to, is sufficient. As the respondents' case stands on the complaint the whole legal title to the homestead was in them from the time of the second marriage of their stepmother, free from any right of interference by the administrator, and the sale of it for the purposes stated in the petition was without authority of law and void. It was expressly exempted from such sale by sec. 3874, Stats. 1898, which existed at the time of the proceedings in question. So the alleged sale did not pass any title to the property. Here there was no adjudication, so far as appears, either that the lands did not include a homestead or that facts existed permitting a sale of the homestead. There was a petition to sell the lands as if no question of homestead was involved, and the sale presumably was made accordingly. Of course, under such circumstances a purchaser could obtain no better title than he would to land bought by him at an administrator's sale which did not belong to the intestate at the time of his decease.

The only remaining question presented that need be considered, since the second demurrer cannot be regarded as before us, is: Does the complaint as matter of law show fatal

laches on the part of respondents? Appellants' counsel earnestly insist that such is the case, in that it appears that some twelve years elapsed after respondents attained their majority before the action was commenced, during which time the records of the county court would have informed them of sufficient facts to at least have moved them, as persons of ordinary prudence, to make such an investigation as would have led to a discovery of all the circumstances pleaded, and that the complaint does not state facts excusing the long delay. *Rogers v. Van Nortwick,* 87 Wis. 414, 58 N. W. 757, and similar authorities are referred to.

That case does not seem to control because it went upon the theory that plaintiff had actual knowledge of such facts as if acted upon with reasonable diligence would have led to a full discovery. Other cases cited, and many others that might be referred to, turned upon the same theory. In the *Van Nortwick Case* plaintiff's knowledge of suggestive facts was established upon the trial. Here the complaint states that respondents did not discover the condition of things detailed till shortly before the action was commenced, and in June, 1905. There is no fact or facts disclosed which necessarily suggest that respondents are chargeable with having earlier obtained knowledge sufficient to put them upon inquiry. What may be shown on a trial by way of defense, and to what extent respondents may fail to establish the conditions pleaded excusing their delay, are far different questions.

The complaint states in substance as an excuse for the late discovery, as substantially before indicated, that when respondents' father died they were too young to appreciate their rights; that they were brought up in ignorance by the defendants, kept isolated on the farm for many years after the death of the father and prevented from mingling with outside people, great pains being taken in that regard, all for the purpose of guarding against their discovering the facts as to their rights. It would not be unreasonable for persons so treated

from early childhood, when they would not be expected to appreciate their position, till their majority, not to suspect their relation to property treated as it is alleged the property in question was, or to inspect public records in respect thereto, till by accident or good fortune some fact or facts came to their notice putting them upon inquiry.

True, as claimed, where laches is in issue the plaintiff is chargeable with such notice as he might have obtained by investigation, provided the facts already known to him were such as to put a man of ordinary prudence on inquiry, which if pursued would bring home to him the real situation (*Rogers v. Van Nortwick, supra; Melms v. Pabst B. Co.* 93 Wis. 140, 66 N. W. 244), and a complaint in a case of this sort should show the particular wrongful acts, when they were perpetrated, and if so long before action as to suggest laches, when the discovery was made and what the discovery was. But that under our liberal rules of pleading is satisfied if the facts expressly and inferentially pleaded fairly cover the subject. Here sufficient was stated to constitute a fraudulent and illegal appropriation or disposition of respondents' property, and the statement that they did not have any knowledge of the facts until June, 1905, when they were informed of the situation and immediately commenced an investigation, inferentially pleaded that in June, 1905, they for the first time obtained information in respect to their being the real owners of the real estate in question, and the manner in which they had been deprived of their property, as alleged.

We will not pursue this subject further or attempt to discuss the cases cited, and the many judicial authorities at hand, showing that our decision is fully justified thereby. Such a treatment of the case would require a very long opinion without serving any valuable purpose. Every case of this sort must stand or fall on its own peculiar facts. That which constitutes fatal laches under some circumstances will not under others. It is one thing to condemn an alleged cause of

action for laches on the evidence produced, and quite another to condemn a complaint as insufficient on the ground of laches disclosed thereby. In the latter situation all facts are presumed to exist which are reasonably inferable from those pleaded and laches is not presumed. In the former such facts only are recognized as are established by evidence to a reasonable certainty. It may be, as before indicated, that fatal laches can be shown by the evidence upon the trial of this case and that respondents cannot make out a case showing themselves not guilty of such laches, but the allegations of the complaint are full enough to show a probable ground for relief.

Thus it is considered that the complaint shows a cause of action for recovery of the whole land in question because of its having been obtained by fraud, and especially to recover the homestead forty because it was sold without authority of law.

By the Court.—The appeal from the order striking out the second demurrer is dismissed, and the order overruling the first demurrer is affirmed.

STARK, Appellant, vs. HUBER MANUFACTURING COMPANY, Respondent.

December 8, 1906—January 8, 1907.

Mortgages: Assignment with warranty: Discharge of prior incumbrances: Measure of damages: Practice: Notice of application for judgment: Appeal and error.

1. A holder of security, who is obliged to pay a prior lien in order to protect his own, has no right to damages against a warrantor without allegation and proof of inability to collect his own debt in full after reimbursing himself the amount paid in protection of his security.
2. Defendant, a foreign corporation which had not complied with sec. 1770*b*, Stats. 1898, by filing a copy of its charter with the secretary of state, entered into a contract, at Appleton, with

citizens of Wisconsin, whereby they gave it their promissory note secured by chattel mortgage on certain chattels belonging to them. Plaintiff, having purchased such note and mortgage, brought an action alleging the giving of such note and mortgage, their assignment to him, and that, by reason of noncompliance with sec. 1770*b*, the note and mortgage were void and worthless, whereby plaintiff was obliged to pay certain sums in discharge of an execution levied upon the mortgaged property under a pre-existing judgment against the mortgagors, which sums plaintiff had paid to the use of defendant, and recovery of such sums with interest was prayed. There was no allegation either that the signers of the note were not solvent and ready to pay it, nor that the mortgaged property was inadequate to satisfy the judgment paid off by plaintiff and also his mortgage debt, nor that the mortgage debt had not been paid and satisfied. On demurrer to the complaint, *held:*

(1) The complaint failed to show that plaintiff had as yet suffered any loss or damage.

(2) Assuming, as alleged, that the mortgage was wholly invalid and void, conferring no lien at all, there was neither reason nor necessity for plaintiff to discharge any prior liens or incumbrances, since such payment could not be necessary to protect plaintiff's interest, for he had none.

(3) Plaintiff's measure of damages, if he was wholly unable to collect his debt, would be the price paid by him to defendant, or at most the amount of the debt.

(4) Plaintiff could not charge defendant with the result of his own gratuitous and useless act in buying up or paying off any other debt of the mortgagors, since no such act could have been within the contemplation of the parties as a probable result of a breach of warranty of the validity of the mortgage.

3. One in peril from breach of a warranty must exercise reasonable diligence to minimize damages, and, if his rights against property or third persons are lost by his own neglect, he cannot hold the warrantor responsible.

[4. Whether, on sustaining a demurrer to a complaint and granting leave to answer on terms, omission of notice to the plaintiff of application for judgment on failure to plead within the time allowed is of itself a fatal error, or merely such an irregularity in procedure that reversal need not result unless, in some form of application to the trial court, appellant (plaintiff below) shall have made affirmatively to appear that he has suffered substantial prejudice thereby, not determined, the appellate court being equally divided in opinion thereon.]

APPEAL from a judgment of the circuit court for Outagamie county: JOHN GOODLAND, Circuit Judge. *Affirmed.*

The amended complaint alleged that the defendant, being a foreign corporation engaged in the state of Ohio in the business of manufacturing steam engines and boilers and various agricultural implements, which had not complied with sec. 1770*b*, Stats. 1898, by filing copy of its charter, etc., with the secretary of state, on July 17, 1902, entered into contract, at Appleton, Wisconsin, with three persons named Bailey, there resident, whereby the latter gave to the defendant their promissory note for $1,874 and a chattel mortgage to secure the same upon certain machinery belonging to them. On July 25th the plaintiff purchased said note and mortgage from the defendant for $1,675, and is still the owner and holder of the same; that, by reason of noncompliance with sec. 1770*b*, said note and mortgage were void and worthless, whereby plaintiff has been compelled to pay out the sum of $571.75 in discharge of an execution levied upon said property under a preexisting judgment against the Baileys, which sum, it is alleged, the plaintiff has paid to the use of the defendant, and before this action demanded repayment thereof. Recovery of this amount with interest from April, 1904, was prayed. A general demurrer was interposed, which was sustained, with leave to the plaintiff to serve amended complaint within twenty days upon the payment of $10 costs. Such order was served on the plaintiff October 3, 1905. On October 30th, upon affidavit of failure to serve such amended complaint, but without notice, defendant moved for judgment, whereupon judgment was ordered and entered dismissing the complaint, and for costs, from which judgment the plaintiff appeals.

For the appellant the cause was submitted on the brief of *Gerrit T. Thorn* and for the respondent on that of *R. L. Morse.*

DODGE, J. Whether the complaint sufficiently alleges that the chattel mortgage given defendant by the Baileys was such

a contract as is declared void by subd. 10, sec. 1770*b*, Stats. 1898, and whether any warranty of validity of such mortgage is shown, may be passed, for the reason that there are presented other seemingly insuperable obstacles to the maintenance of this action. The complaint is entirely silent as to whether the debtors have made any objection to the validity of either the note or the chattel mortgage sold plaintiff by defendant. We may perhaps guess that they have not, since plaintiff makes no claim to recovery of the price he paid, as he naturally would if he had been unable to collect. Viewing the situation, then, in this light, namely, that the owners concede the validity of the note and mortgage as against them, the plaintiff is entitled, if invalidity of mortgage against the judgment creditor be conceded, as also defendant's warranty of such validity, to recover only the damage which he has suffered by reason of the superior rights of such judgment creditor. If plaintiff were purchaser outright of a warranted title to the chattels, his damages would be all that he necessarily paid to clear it from any superior liens or rights (Rawle, Cov. Tit. [2d ed.] 158; *Johnson v. Brice*, 102 Wis. 575, 580, 78 N. W. 1086; *Patterson v. Cappon*, 125 Wis. 198, 203, 102 N. W. 1083), but he obtained by the mortgage only a right in the property as security for a specified amount. If he can recover the full amount of his secured debt he is in no wise damaged by the presence of other and superior liens. One holding a thousand-dollar mortgage on property salable for $10,000 is not injured by a prior mortgage of $100, for the security, after paying such superior incumbrance, is still sufficient to satisfy his rights therein. Hence a holder of security who is obliged to pay a prior lien in order to protect his own has no right to damages against a warrantor without allegation and proof of inability to collect his own debt in full after reimbursing himself the amount paid in protection of his security. *Foster v. Taggart*, 54 Wis. 391, 11 N. W. 793; *Beetle v. Anderson*, 98 Wis. 5, 73 N. W. 560; *Shaw v. Gilbert*, 111 Wis. 165, 191, 194, 86 N. W. 188; *Ill. T. & S.*

Bank v. Alex. Stewart L. Co. 119 Wis. 54, 65, 94 N. W. 777. There is in this complaint no allegation either that the signers of the note are not entirely solvent and ready to pay it, nor that the property mortgaged is not adequate to satisfy the judgment paid off by plaintiff and also his mortgage debt. Nay, it is not even alleged that they have not been paid and satisfied. The complaint, therefore, fails to show that plaintiff has as yet suffered any loss or damage. If, however, we indulge in no assumption as to the attitude of the mortgagors, and proceed to view plaintiff's rights upon the letter of the complaint, then we have, as alleged, a wholly invalid and void mortgage, conferring no lien at all. In that situation there could be neither reason nor necessity for plaintiff to discharge any prior liens or incumbrances. Such payment could not be necessary to protect his interest, for he has none. His measure of damages, if he has been wholly unable to collect his debt, is the price paid by him to defendant, or, at most, the amount of the debt. *Hahn v. Doolittle,* 18 Wis. 196; *Roehl v. Volckmann,* 103 Wis. 484, 79 N. W. 755; *Duecker v. Goeres,* 104 Wis. 29, 36, 80 N. W. 91. We do not decide whether, under some circumstances, this amount might be increased by expenses necessarily incurred in good faith in attempting to defend or enforce his lien before he discovered its invalidity, for this plaintiff obviously made such discovery before he paid the amount he now seeks to recover. He cannot charge the defendant with the results of his own gratuitous and useless act in buying up or paying off any other debt of the mortgagors. No such act could have been within the contemplation of the parties as a probable result of the breach of a warranty of the validity of the mortgage.

Another consideration precludes recovery as damages of the specific sum paid to discharge this judgment against the mortgagors, and that is that plaintiff cannot have lost the money so paid except by his own neglect. The complaint al-

leges the validity of such judgment and right to levy execution thereunder upon the mortgaged property. In absence of such facts he had no need to pay it. These allegations being true, plaintiff, if compelled to pay the judgment, could have enforced it either against the debtors or against such property. He can still do so, unless, by his own neglect, he has allowed either the right or the opportunity to be lost. If so lost, of course he cannot hold defendant responsible. One in peril from breach of a warranty must exercise reasonable diligence to minimize damages. *Kelley, M. & Co. v. La Crosse C. Co.* 120 Wis. 84, 90, 97 N. W. 674.

Another assignment of error rests upon the fact that final judgment against plaintiff was entered without notice of application therefor. While we are all of opinion that the statutes, together with Circuit Court Rule XI, sec. 1, require notice of application for judgment under such circumstances, the members of the court are equally divided in opinion as to whether such an omission is of itself a fatal error, or merely such an irregularity in procedure that reversal need not result, unless, in some form of application to the trial court, appellant shall have made affirmatively to appear that he has suffered substantial prejudice thereby. See *Douville v. Merrick,* 25 Wis. 688; *Bonnell v. Gray,* 36 Wis. 574; *Lindauer v. Clifford,* 44 Wis. 597.

By the Court.—Judgment affirmed.

STECKBAUER, Appellant, vs. LEYKOM and another, Respondents.

December 8, 1906—January 8, 1907.

Setoff and counterclaim: Parties: Sales: Failure of consideration: Measure of damages.

1. Defendants negotiated for the purchase of a part interest in a manufacturing plant, of which plaintiff and M. were each a one-fourth owner. Plaintiff made sale of one half of his one fourth through M. as his agent. Plaintiff and M. each took a separate note for the consideration. *Held*, under these circumstances, if defendants had a valid claim for partial failure of consideration, they could counterclaim for a proportionate amount of damages in a suit by plaintiff on his note, although M. was not a party to the suit.
2. Plaintiff brought an action on a note evidencing the consideration defendants agreed to pay him for the sale and transfer of his interest in the net assets of a manufacturing business. The purchase was made in reliance on the statements contained in an inventory, purporting to give a full, complete, and correct statement of the resources and liabilities of the business, which was admittedly incorrect. Defendants had given plaintiff a note for the proportionate part of the consideration moving to him. *Held*, that thereby was established a partial failure of consideration and a defense *pro tanto*, properly enforceable by way of counterclaim in an action on the note, and the fact that the misstatements were not made wilfully did not affect defendants' rights.
3. The statements in the inventory being in fact untrue, although the party making them at the time believed them to be true, were a legal wrong for which relief should be awarded, upon the ground that the party making them must be held to respond for the injury done in assuming to know and to represent as facts things which did not actually exist, but upon which the other party relied to his damage in making the purchase.
4. Where one bought for $2,000 an eighth interest in a manufacturing business on the basis of $16,000 of net assets, while the inventory showed somewhat over $18,500, his damages by reason of an overstatement of the resources to the amount of $1,050 is not one quarter of that sum, but one eighth of thirty-two thirty-sevenths thereof.

APPEAL from an order and a judgment of the circuit court for Langlade county: JOHN GOODLAND, Circuit Judge. *Modified and affirmed.*

Prior to October 1, 1903, the plaintiff was associated with one Thomas E. Mullen and one C. W. Fish as copartners in doing a sawmill, lumber, and mercantile business at Elcho, Wisconsin. Fish owned a one-half interest in the business, and the plaintiff and Mullen each a one-quarter interest. Shortly prior to October 1, 1903, these partners had taken and made an inventory of the partnership business, and had reduced it to a written statement, of which they each knew the contents. It showed total resources of $27,278.97 and total liabilities of $8,718.02, leaving assets over liabilities of $18,560.95. In the following November, Mullen negotiated with defendants for the sale to them of a quarter interest in the firm business. Of this Mullen informed plaintiff, and suggested that plaintiff and he each sell one half of his interest, one eighth of the whole, to defendants. Mullen dealt principally with the defendant *Findeisen.* The negotiations as to the amount of the assets of the firm were conducted on the facts shown by this inventory, a copy of which was in the possession of Mullen. This was exhibited to *Findeisen,* by whom it was inspected, and the defendants' purchase was made upon the facts shown by this statement. Upon the condition that the new partnership pay all the outstanding obligations and demands of the old firm, the defendants agreed to pay $4,000 for a one-fourth interest in the firm property and business. The only information given the defendants as to the amount of such outstanding obligations of the old firm at this time was the amounts and items specified in this inventory. The sale was consummated by defendants giving two notes of $2,000 each, one payable to plaintiff for one half of his interest, and the other to Mullen for one half of his interest. The defendants went into possession. About one month thereafter the new firm organized as a corporation with

$30,000 capital stock. This was apportioned to the members in proportion to their interest in the firm property, and this property was transferred to the corporation as payment for the stock. It was discovered at this time that the inventory on which the sale had been made to the defendants did not correctly represent the status of the old firm's condition. An error as to the actual amount of the resources in the sum of $500 had been made through addition; there was actually $550 less slabbing than inventoried; and $1,573.78 of outstanding claims and liabilities, which were to be paid by the new firm, had been omitted from the inventory and statement. The following year, before full payment of plaintiff's note, defendants demanded of plaintiff that they be allowed credit for this shortage in assets and excess in liabilities in the proportion the interest purchased from plaintiff bore to the whole of the net assets of the firm. This plaintiff refused to do. Defendants paid Mullen's note and $1,000 to plaintiff on the note in suit. Plaintiff brings this action to recover the balance of $1,000 due on this note, with accrued interest. Defendants assert the right to reduce this amount, by way of counterclaim, by such part of the damage they claim to have suffered as is chargeable against plaintiff. The parties waived a jury and stipulated as follows:

"It is hereby stipulated and agreed by and between the parties to this action that the amount of the several items claimed by the defendants in their counterclaim are as follows: For error in footing $500. For shortage of slabs $550. Amount due for insurance October 1, 1903, $144.48. On the 12th day of November $266.53. G. W. Jones Lumber Company bill $869.10. John Martin $35.11. Bert Merrill $33.40. Antigo Iron Works $307.03. J. C. Lewis Co. $159.50. M. Blitzen $125. Making a total of $2,745.76. And that the amount to be recovered by the defendants, if they recover anything on their counterclaim, is to be determined by the court upon the basis of the figures contained in this stipulation, and any other disputed question of fact may be found and determined by the court."

The court's finding is in substantial accord with the foregoing facts. Judgment was awarded plaintiff for the amount due on the note, less the sum of $327.69, the amount of damages apportioned against plaintiff. The court held that defendants had a right to recover on the loss they sustained by reason of the difference between the net assets of the firm when the defendants bought in and that represented by the inventory exhibited to them by Mullen, and on which they relied in making the purchase from plaintiff and Mullen. This is an appeal from such judgment and an order overruling the demurrer to defendants' counterclaim.

For the appellant the cause was submitted on the brief of *Max Hoffman,* and for the respondents on that of *Foster & Morson.*

SIEBECKER, J. Plaintiff's contention that defendants' counterclaim is not available because Mullen was not a party to this action was properly overruled. It appears that defendants conducted all the negotiations for the purchase of a part interest in the property of the Fish & Mullen Lumber Company, of which plaintiff was a member, with Mullen. It is also shown that plaintiff made a sale of one half of his one-quarter interest in this company through Mullen as his agent for the sum of $2,000. It is obvious from the transaction that plaintiff's transfer of part of his interest amounted to a separate sale by him, and was independent of the transfer made by Mullen to defendants. Each of them took a separate note for the consideration, fixed at $2,000, which defendants agreed to pay each of them separately. Under these circumstances the counterclaim for a proportionate amount of the damages could be properly asserted in his suit on the note, if defendants have a valid claim.

The contention is made that defendants' alleged counterclaim is insufficient in that it fails to show facts sufficient to constitute a fraud, and that if sufficient in this respect they

cannot avail themselves of any relief under it, because no rescission of the contract is alleged. These same questions are raised upon the merits of the case, and we may therefore consider them as to both phases of the case. No claim is made that there was a rescission of the sale. This fact obviates the necessity of considering what would be the rights of the parties had a rescission taken place. The situation then is: Plaintiff brings this action on a note evidencing the consideration defendants agreed to pay him for the sale and transfer of one half of his interest in the net assets of the Fish & Mullen Lumber Company. If the defendants were in fact damaged in the transaction and have a valid claim, can they assert such damage to reduce plaintiff's demand on the note? The practice of allowing damages arising from fraud, mistake, partial failure of consideration, or nonperformance of some of the contract obligations to be counterclaimed by way of recoupment in actions for the recovery of the consideration agreed upon in such cases has been established to avoid circuity of actions and multiplicity of suits when such a claim can be adjusted in a suit to enforce payment of the consideration of such transfer without depriving the parties of any of their rights in the matter. Such defense has been recognized as proper in an action on a note given to evidence the consideration. The following cases in this and other courts may be consulted as sustaining this practice: *Griffiths v. Parry,* 16 Wis. 218; *Peterson v. Johnson,* 22 Wis. 21; *Butler v. Titus,* 13 Wis. 429; *Gamache v. Grimm,* 23 Mo. 38; *Wyckoff v. Runyon,* 33 N. J. Law, 107; *Stacy v. Kemp,* 97 Mass. 166; *Burnett v. Smith,* 4 Gray, 50; *Hodgkins v. Moulton,* 100 Mass. 309; *Davis v. Wait,* 12 Oreg. 425, 8 Pac. 356; *Herbert v. Ford,* 29 Me. 546; *Mercer v. Clark,* 3 Bibb, 224; *South Mil. B. H. Co. v. Harte,* 95 Wis. 592, 70 N. W. 821. The right to counterclaim damages under such circumstances in actions by one of the parties to the contract has been repeatedly upheld by this court. *Miner v. Medbury,* 6 Wis. 295;

Rosebrook v. Runals, 32 Wis. 415; *Smith v. Carter,* 25 Wis. 283; *Schweickhart v. Stuewe,* 71 Wis. 1, 36 N. W. 605; *Montreal River L. Co. v. Mihills,* 80 Wis. 540, 50 N. W. 507; *Standard Mfg. Co. v. Slot,* 121 Wis. 14, 98 N. W. 923; *Bird v. Kleiner,* 41 Wis. 134; *Rogers v. Humphrey,* 39 Me. 382; *Hathaway v. Hagan,* 59 Vt. 75, 8 Atl. 678; *Racine Co. Bank v. Keep,* 13 Wis. 209; *Walker v. Wilson,* 13 Wis. 522; *Akerly v. Vilas,* 15 Wis. 401; *Akerly v. Vilas,* 21 Wis. 88.

It appears that defendants made the purchase of an interest in the firm property and business in reliance on the statements in the inventory, purporting to give a full, complete, and correct statement of the resources and the liabilities of the firm. It is now admitted to have been incorrect in both respects, by overstating the resources in the sum of $1,050 and in omitting liabilities to the amount of $1,573.76. True, it does not appear that such misstatements were wilfully made. This, however, does not affect the right of defendants to recoup against plaintiff. The fact that defendants were led to pay the consideration upon the admitted representations that they were to have an interest in property valued at $1,050, which plaintiff and his associates did not possess, and that they were required to contribute their share to pay $1,573.76 of prior debts, not included in the statement of liabilities, and for which they became obligated through the incorrect statements of the inventory and the representations of plaintiff's agent Mullen, establishes a partial failure of consideration and is a defense *pro tanto,* and may properly be enforced by way of counterclaim in the action to recover the consideration for the purchase of the property involved. If the statements of the inventory were in fact untrue, though the party making them at the time believed them true, it is a legal wrong for which relief is awarded, upon the ground that the party making them must be held to respond for the injury done in assuming to know and to represent as facts things which did not actually exist, but on which the other party

relied to his damage in making the purchase. Its operation is in the nature of a constructive fraud. We are not clear whether the trial court regarded the evidence in this light or whether the stipulation of the parties was held to be an agreement that there was a partial failure of consideration, and that an allowance of damages, on the basis of the items stipulated, was to be made defendants by way of reduction of plaintiff's claim. However that may be, we are of the opinion that, under the evidence and facts stipulated, the court was justified in proceeding upon either theory. Whichever one was followed would lead to the same result, namely, that defendants were entitled to a reduction of plaintiff's claim on account of the loss they sustained by reason of the errors in the inventory.

The court allowed defendants one eighth of the damages against plaintiff. This must have been upon the ground that plaintiff was liable to this extent because defendants acquired a one-eighth interest in the business and property of the firm. We perceive no error in applying this rule to the amount of liabilities they paid in addition to those specified in the inventory, but we do not find that this would be the correct measure of damage for the $1,050 deficiency in resources. Defendants purchased into the firm on the basis of $16,000 net assets, while the inventory showed an amount somewhat over $18,500. Under these circumstances the amount allowed should be not to exceed one eighth of thirty-two thirty-sevenths of the whole as the proportional loss due to such $1.050, to be borne by plaintiff, because of the diminution of resources. This would be substantially the sum of $113.20, which is to be deducted instead of the full one eighth allowed by the court. This with $196.72, which is one eighth of the excess of liabilities, make the total which should have been allowed. This matter was not specifically brought to the attention of the lower court. Had it been, the court would undoubtedly have made the allowance in this amount. We will therefore

modify the judgment in this respect and affirm it in all other respects.

By the Court.—The judgment is modified by deducting the sum of $18.05 from the sum allowed as damages to the defendants, so that plaintiff shall have judgment for $763.67, and as so modified the judgment is affirmed; neither party to recover costs on this appeal, but respondent to pay the clerk's fees in this court.

PLESHEK, Respondent, vs. McDONELL and another, Appellants.

December 8, 1906—January 8, 1907.

Judgments: Inequitable enforcement: Relief against execution: Independent action: Injunction.

1. The right to prevent the inequitable enforcement of a judgment (by levy of an execution on the debtor's homestead and proceeding to sale thereunder) must be enforced by motion in the action in which the execution was issued. A separate action for such purpose cannot be maintained.
2. This rule applies where a circuit court is invoked to enjoin the enforcement of a judgment by an independent action in the same court. *Jackson M. Co. v. Scott, ante,* p. 267, followed.

APPEAL from a judgment of the circuit court for Shawano county: JOHN GOODLAND, Circuit Judge. *Reversed.*

This action was brought to restrain the sale of lands levied upon under an execution. An execution was issued upon a judgment obtained by defendant *Barth* against plaintiff. Plaintiff claimed and set up in his complaint that the property levied upon was his homestead and of less value than $5,000. The action was brought against defendant *Barth* and *McDonell,* sheriff, who levied under the execution. The complaint sets up facts showing that the real estate levied upon

was plaintiff's homestead, does not exceed the amount in value of $5,000, and that defendant *Barth* caused an execution to be issued and a levy made thereunder by defendant *McDonell,* sheriff of Shawano county, and notice of sale to be published; that judgment was not upon cause of action arising out of liability and debts upon liens, mortgages, or taxes, and that defendants threaten to sell the real estate so levied upon; and prays for an injunction restraining sale, and for general relief. The answer admits that plaintiff is owner of the premises levied upon, the issuance of execution, and levy and notice of sale, and denies other allegations of the complaint. The case was tried by the court and findings made in favor of plaintiff, and judgment ordered according to the prayer of the complaint. Judgment was entered accordingly, from which this appeal was taken.

For the appellants the cause was submitted on the brief of *Gerrit T. Thorn* and *Eberlein & Eberlein,* and for the respondent on that of *A. L. Schmitz.*

KERWIN, J. From the view we take of this case it will be unnecessary to consider the questions discussed by counsel. The action was improper under the decisions of this court. The plaintiff, if he had a right to prevent the enforcement of the execution against his property, should have proceeded by motion in the action in which the execution was issued to prevent the abusive use of the process of the court, and a separate action for such purpose cannot be maintained, since one circuit court cannot restrain the enforcement of a judgment in another circuit court; and this rule applies where one circuit court is invoked to restrain the enforcement of a judgment by an independent action in the same court. *Endter v. Lennon,* 46 Wis. 299, 50 N. W. 194; *Orient Ins. Co. v. Sloan,* 70 Wis. 611, 36 N. W. 388; *Stein v. Benedict,* 83 Wis. 603, 53 N. W. 891; *Jackson M. Co. v. Scott, ante,* p. 267, 110 N. W. 184. In the latter case this question has been fully

considered, and further discussion of it is unnecessary. This action is ruled by the foregoing cases in this court.

By the Court.—The judgment of the court below is reversed, and the cause remanded with instructions to dismiss the action.

BOVEE, Appellant, vs. JOHNSON, Executor, Respondent.

December 8, 1906—January 8, 1907.

Wills: Probate: Appeal to circuit court: Procedure: Estoppel: Trial de novo: *Appearance by attorney: Jurisdiction.*

1. On appeal to the circuit court by an heir and legatee from an order of the county court admitting a will to probate, it is error for the circuit court to rule that appellant, who was present in the county court at the time the will was admitted to probate and made no objection thereto, is estopped from contesting such probate in the circuit court by reason of his consent given in the county court.
2. Under sec. 2294, Stats. 1898 (providing that no will shall be effectual to pass either real or personal estate unless it shall have been duly approved and allowed in the county court as provided in the statutes, *or on appeal in the circuit court* or in the supreme court), sec. 4031 (providing that in all cases not otherwise provided for, any person aggrieved by any order, judgment, decree, or determination of the county court may appeal therefrom to the circuit court), and sec. 4034 (providing that, when the cause is thus transferred from the county court to the circuit court by appeal, it may be brought to *trial in the same manner* as actions originally brought therein, and the court shall proceed to the trial and the determination of the matter according to the rules of law, allowing a trial by jury of all questions of fact, in cases where such trial may be proper; and such court may direct an issue to be made up between the parties in a brief form, when it shall be deemed necessary, and appeals may be taken to the supreme court as in other cases), an heir named as legatee in a will, who was present in the county court on its probate and made no objection, may appeal from the determination admitting such will to probate and file objections to such probate, and is thereupon entitled to a trial *de novo* in the circuit court.

3. On an appeal from a judgment of the circuit court admitting, on appeal from a judgment of the county court, a will to probate, claims were made in the supreme court, for the first time, that the appeal papers from the county court were insufficient to give the circuit court jurisdiction. These claims were based on two grounds: (a) that it did not appear that appellant was in any wise interested in the estate; (b) that the notice of appeal was not signed by appellant nor by any person by his direction. *Held:*

(1) Recitation in the petition for the probate of the will that appellant was one of testator's next of kin and heirs at law, and in the will, by which he was named as a legatee, that he was a son of deceased, and a statement in the notice of appeal that appellant was aggrieved by the order of the county court, showed that appellant was interested in the estate.

(2) Appellant having given and signed the undertaking on such appeal as principal, and the same having been approved by the county court, the notice of appeal signed B., "attorney for appellant," sufficiently established that the notice of appeal was given by his direction.

(3) The circuit court had jurisdiction by virtue of the appeal.

APPEAL from a judgment of the circuit court for Outagamie county: JOHN GOODLAND, Circuit Judge. *Reversed.*

It appears from the record and is undisputed that June 21, 1904, Frederick Bovee executed his will wherein he nominated and appointed the proponent, *George A. Johnson,* executor thereof, and in which he bequeathed to his son, the contestant, *Irving Bovee,* $10. July 19, 1904, the said Frederick Bovee died, leaving said instrument. On August 23, 1904, said will was admitted to probate by the county court of Calumet county. Within the time required by the statutes the son, *Irving Bovee,* by his attorneys, Barber Bros., served notice of appeal to the circuit court for Calumet county, and filed the same with the requisite undertaking with the county court, and the same was duly approved by that court October 21, 1904. On November 5, 1904, the county judge of that county duly certified the papers and the proceedings in the case to the circuit court for that county. On February 21,

1905, the said *Irving Bovee* by Barber Bros., his attorneys, filed in the circuit court for Calumet county objections to the admission and allowance of said will to probate, to the effect that the will was not duly executed by the testator; that the testator was not of sound mind at the time the will purported to be so executed, and had not sufficient mental capacity at that time to execute the same; that such instrument was procured by fraud and undue influence exercised by the son, William Bovee, and others. On March 20, 1905, the place of trial was changed to Outagamie county on an affidavit of prejudice. On August 26, 1905, the executor, *George A. Johnson,* and the son, William Bovee, were examined under sec. 4096, Stats. 1898. February 7, 1906, the cause came on for trial in the circuit court, whereupon the proponent and executor named in the will called as a witness the county judge of Calumet county, who produced and identified the will, the petition of said executor for its admission to probate, the order for publication, the notice of publication, the notice of hearing, proof of publication, and then, under repeated objections and exceptions made and taken by the attorneys for said contestant, *Irving Bovee,* the said county judge was allowed to testify as to what was sworn to before him at the time of the probate of the will August 23, 1904, by two of the witnesses to the execution of the will, the certificate of proof of the will issued by the county court of Calumet county August 23, 1904, the decree of the county court admitting the will to probate August 23, 1904, and the recitals therein, the order of the county court appointing the executor and requiring him to give the requisite bond or undertaking, the bond given in pursuance thereof, the letters testamentary issued to the executor, the order for the adjustment of claims against the estate, the order appointing appraisers, the notice of appeal and undertaking given thereon on behalf of said contestant, the fact that no objections were made nor exceptions filed to the proof of the will in the county court, the fact that the

county court at the time of such probate inquired of those present, including said *Irving Bovee,* as to whether there was any objection to admitting the will to probate, and that their answer was in the negative; and on cross-examination he testified that neither *Irving Bovee* nor any of the persons present at the time of probate appeared by attorney. Thereupon the executor and proponent rested the case, and the contestant, *Irving Bovee,* also rested the case.

Upon such testimony the circuit court made findings of fact to the effect that the will was made and executed by the testator as stated; that it was admitted to probate August 23, 1904, as stated; that at that time *Irving Bovee* was present in the county court and consented to the admission and allowance of the will to probate as the will of the deceased. As conclusions of law the circuit court found that the will was so admitted to probate August 23, 1904, with such consent of *Irving Bovee* and without fraud or mistake, and that said *Irving Bovee* was estopped from contesting such decree and allowance to probate, and directed and ordered judgment in favor of said executor and against said *Irving Bovee* accordingly. From the judgment so entered, with costs, the said *Irving Bovee* appeals.

For the appellant there was a brief by *Barber Bros. & Clark,* attorneys, and *Barbers & Beglinger,* of counsel, and oral argument by *Fred Beglinger.*

J. E. McMullen, for the respondent.

CASSODAY, C. J. 1. The rulings of the circuit court to which exceptions were taken were to the effect that where an heir at law is present in the county court at the time the will is admitted to probate and makes no objection to the same, and subsequently appeals therefrom to the circuit court, he is estopped from contesting such probate in the circuit court by reason of his consent given in the county court. If such is the

law then it has been repeatedly disregarded by trial courts, if not by this court. The statute declares:

"No will shall be effectual to pass either real or personal estate unless it shall have been duly approved and allowed in the county court as provided in these statutes, *or on appeal in the circuit court* or in the supreme court." Sec. 2294, Stats. 1898.

Under that statute the circuit court is only authorized to prove and allow the probate of the will when taken to that court on appeal from the county court. *Will of Hunt,* 122 Wis. 460, 463, 100 N. W. 874. Another section of the statute provides that "in all cases not otherwise provided for, . . . any person aggrieved by any order, judgment, decree, determination" of the county court "may appeal therefrom to the circuit court." Sec. 4031, Stats. 1898. The statute also provides that when the cause is thus transferred from the county court to the circuit court by appeal, it "may be brought to *trial in the same manner* as actions originally brought therein, and the court shall proceed to the trial and the determination of the matter according to the rules of law, allowing a trial by jury of all questions of fact, in cases where such trial may be proper; and such court may direct an issue to be made up between the parties in a brief form, when it shall be deemed necessary, and appeals may be taken to the supreme court as in other cases." Sec. 4034, Stats. 1898. Thus, it was held by this court at an early day that upon such appeal there is to be "a trial *de novo* in the circuit court, and the order of the county court was wholly immaterial. It was properly rejected as an item of evidence to be considered by the jury." *Central Bank v. St. John,* 17 Wis. 157, 166. In a later case it was held:

"Upon appeal by either party from an award of commissioners allowing a claim against the estate of a decedent, the case is triable *de novo* in the circuit court, and the amount of the plaintiff's recovery may exceed the amount of the award." *York v. Orton,* 65 Wis. 6, 8, 26 N. W. 166.

In a late case on appeal from the judgment of the circuit court affirming the final order of distribution of the county court it was held that "the trial in circuit court is a trial *de novo,* and not a mere review of errors." *Fitch v. Huntington,* 125 Wis. 204, 209, 102 N. W. 1066. The same rule has been applied in case of appeals from the county court in will cases. Thus, in an early case where the will was admitted to probate by the county court without objection, four of the heirs at law appealed therefrom to the circuit court, where the cause was tried *de novo,* the proponents and executors taking upon themselves the burden of proving the execution of the will anew, the same as though it had never been admitted to probate in the county court. *Will of Jackman,* 26 Wis. 104, 108, 109. In that case it was said by the majority of the court:

"In this state the jurisdiction concerning the probate of wills and the administration and settlement of estates is vested in the county courts. The decision of those courts upon the question of the validity or invalidity of the will is conclusive, unless an appeal is taken therefrom. . . . And upon the appeal being perfected, the circuit court is authorized to 'proceed to the trial and determination of the question according to the rules of law; and if there shall be any question of fact to be decided, issue may be joined thereon under the direction of the court, and a trial thereof had by a jury.' . . . And so, upon an appeal from an order of the county court admitting to probate a will, the circuit court must proceed and determine the matter according to settled principles applicable to the case; and if the assistance of the jury is desirable to determine doubtful questions of fact, it may have the verdict of a jury to inform its judgment and conscience."

It was there held:

"(1) On appeal from an order admitting, or refusing to admit, a will to probate, the circuit court may submit questions of fact to a jury, or not, at its discretion. (2) A verdict in such a case has substantially the same effect as a verdict on a feigned issue in chancery; and if it is clearly contrary to the weight of evidence, refusal of a new trial is error."

Mr. Justice PAINE dissented on the ground that the verdict should have the same binding force as in actions at law. In a later case the will was admitted to probate by the county court without objection. One of the heirs at law appealed to the circuit court. Certain questions were submitted to the jury, who found in favor of the contestants. The trial court set aside the verdict of the jury and entered judgment admitting the will to probate. On appeal to this court the judgment was reversed, and the cause remanded with directions to enter judgment upon the verdict of the jury rejecting the probate of the will. *Will of Slinger*, 72 Wis. 22, 37 N. W. 236. We must hold that the contestant was entitled to a trial *de novo* in the circuit court.

2. It is claimed by the proponent that the appeal papers from the county court were insufficient to give the circuit court jurisdiction. This claim is made in this court for the first time. It is based upon two grounds. One is that it does not appear that *Irving Bovee* is in anywise interested in the estate. It does appear, however, in the petition for the probate of the will made by the proponent and executor named in the will and the opposing party in this action that *Irving Bovee* was one of the testator's surviving next of kin and heirs at law; and it does appear from the will itself that *Irving Bovee* was the son of the deceased and a legatee named therein; and he is also named in the decree of the county court admitting the will to probate. It is also stated in the notice of appeal that said *Irving Bovee* is aggrieved by such order or decree of the county court. Thus, it appeared by the records of the county court, at the time of taking such appeal, that *Irving Bovee* was interested in the estate of the deceased. The other objection to such jurisdiction of the circuit court is that such notice of appeal was not signed by *Irving Bovee* nor by any person by his direction. It purports to be given by him and is signed "Barber Bros., Attorneys for Appellant." The statute expressly authorizes "every person of full age and

sound mind" to "appear by attorney in every action or proceeding by or against him in any court except criminal actions." Sec. 2585, Stats. 1898. There is certainly no presumption that *Irving Bovee* was not of full age and of sound mind. He gave and signed the undertaking on such appeal as principal, and the same was approved by the county court. We have no doubt but that the circuit court had jurisdiction by virtue of the appeal. Manifestly, there was a mistrial.

By the Court.—The judgment of the circuit court is reversed, and the cause is remanded for a new trial.

ARP, Appellant, vs. ALLIS-CHALMERS COMPANY, Respondent.

October 15, 1906—January 29, 1907.

Limitation of actions: Non-residents: Foreign cause of action.

Subd. 5, sec. 4222, Stats. 1898 (providing, among other things, that no action to recover damages for personal injuries shall be maintained unless a written notice thereof containing certain prescribed statements shall be served on the person responsible for the injury within one year after the happening of the event), is a limitation statute admitting of no exception, applies to both foreign and domestic causes of action, and acts like any other statute of limitations, extinguishing the right in a domestic cause of action as to all jurisdictions, and extinguishing the right in a foreign cause of action sought to be enforced in this state by a non-resident, as far as its enforcement in our courts is concerned.

APPEAL from a judgment of the circuit court for Milwaukee county: ORREN T. WILLIAMS, Circuit Judge. *Affirmed.*

For the appellant there was a brief by *Robert N. McMynn* and *C. H. Van Alstine,* attorneys, and *Darrow, Masters & Wilson,* of counsel, and oral argument by *Mr. McMynn* and *Mr. Van Alstine.*

For the respondent there was a brief by *Vilas, Vilas & Freeman,* and oral argument by *E. P. Vilas.*

WINSLOW, J. This action was commenced August 10, 1904, and was brought by the plaintiff to recover damages for personal injuries suffered by the plaintiff while in the employ of the defendant as the result of an accident which happened at the defendant's shop in the city of Chicago, March 31, 1903. The defendant is a foreign corporation operating a manufacturing plant in Wisconsin, and on the 17th of September, 1901, had duly filed with the secretary of state an instrument appointing a resident attorney in this state as required by sec. 4231, Stats. 1898. The defendant by answer pleaded as a defense that part of subd. 5, sec. 4222, Stats. 1898, which provides that no action to recover damages for personal injuries shall be maintained unless a written notice thereof containing certain prescribed statements shall be served on the person responsible for the injury within one year after the happening of the event. It was admitted on trial that no notice as required by said subdivision had been served. A verdict for the defendant was directed, and from judgment thereon the plaintiff appeals.

The controlling question presented is whether that part of sec. 4222 above referred to applies to a cause of action arising in another state when a resident of that state brings suit thereon against a resident of Wisconsin in a Wisconsin court. A few well-established principles seem to answer this question in the affirmative. The clause in question is a statute of limitations. *Relyea v. Tomahawk P. & P. Co.* 102 Wis. 301, 78 N. W. 412; *O'Donnell v. New London,* 113 Wis. 292, 89 N. W. 511; *Meisenheimer v. Kellogg,* 106 Wis. 30, 81 N. W. 1033; *Lawton v. Waite,* 103 Wis. 244, 79 N. W. 321; *Gatzow v. Buening,* 106 Wis. 1, 81 N. W. 1003. True, its operation is somewhat different from the operation of other statutes of limitation in that it acts upon the time within which a preliminary

notice shall be served instead of the time within which the summons shall be served, but it is none the less a limitation upon the right to maintain the action. *Troschansky v. Milwaukee E. R. & L. Co.* 110 Wis. 570, 86 N. W. 156. It is the long-settled doctrine of this court that, when a statute of limitations has completely operated, it extinguishes the right of action by taking away the remedy. *Eingartner v. Ill. S. Co.* 103 Wis. 373, 79 N. W. 433. In the absence of any saving clause our statutes of limitation operate against nonresident plaintiffs who bring actions in the courts of this state as well as against residents. *Winter v. Winter,* 101 Wis. 494, 77 N. W. 883; *Fields v. Estate of Mundy,* 106 Wis. 383, 82 N. W. 343. Were the rule otherwise the result would be that nonresident litigants coming into our courts to enforce a foreign cause of action would possess greater rights and privileges than citizens of our own state. They are entitled to the same right and privileges—no more, no less. *Eingartner v. Ill. S. Co.* 94 Wis. 70, 68 N. W. 664. This does not mean that our statutes of limitation have any extraterritorial effect so far as foreign causes of action are concerned. They do not reach over into Illinois and extinguish a right of action arising there. It only means that the foreign right sought to be enforced in this state after our statute has run has ceased to exist so far as regards its enforcement in this state, although the right and all remedies to enforce it in the state of Illinois remain entirely unaffected. Of course, when a cause of action arising here between residents of Wisconsin is barred here the right is extinguished in all jurisdictions, but no one could reasonably claim that because it could not be enforced under the limitation laws of a sister state it is barred here.

So we hold that the provision in question is a limitation statute admitting of no exception; that it applies to both foreign and domestic causes of action; that it acts like any other statute of limitations, extinguishing the right in a domestic cause of action as to all jurisdictions, and extinguishing the

right in a foreign cause of action sought to be enforced in this state by a nonresident, as far as its enforcement in our courts is concerned. This accords with the decision of the trial court.

By the Court.—Judgment affirmed.

TIMLIN, J., took no part.

BARABOO LAND, MINING & LEASING COMPANY, Respondent, vs. WINTER, imp., Appellant.

December 6, 1906—January 29, 1907.

Vendor and purchaser: Construction of contracts: Purchase or option?

1. A contract on which plaintiff founded its action provided that whereas plaintiff was the owner, as vendee, of certain leases and options on certain lands, describing them, it, for a valuable consideration, did thereby grant, bargain, and sell, assign, set over, and deliver to the defendant all its right, title, and interest in and to the options thereinbefore described, upon the following terms and conditions, to wit: "With the express understanding and agreement that this contract is to be in force for and during the period of nineteen months from the date hereof, and that on or before the expiration of said nineteen months the said [defendant] is to pay to the [plaintiff] for such options for all the lands described therein the sum of $300 for each and every acre thereof, . . . in other words, the whole 193¾ acres to be taken and paid for at the rate of $300 per acre. At which time and upon the payment of which said sum the [plaintiff] is to deliver to or cause to be delivered to the [defendant] a deed of the premises described in said options." The contract further provided that "all liabilities attendant as on the option herein described, which are therein imposed" upon the plaintiff, were assumed by the defendant. *Held:*

(1) The instrument was not an option to purchase, but an express sale and transfer of the plaintiff's right, title, and interest in the options to defendant, an assumption by defendant of liabilities thereunder, and an express promise by him to pay

the stipulated price per acre on or before nineteen months, with a promise on the part of plaintiff to deed the lands to defendant.

(2) The provision that the contract was to be in force for nineteen months was not repugnant to or inconsistent with the express agreement to pay.

(3) The covenants in the contract were mutual.

(4) It was immaterial whether the options transferred gave the right to possession or not, since the options secured to plaintiff the right to acquire the ownership of the lands thereby covered and transfer the title to the defendant.

2. In such case the recital of a "valuable consideration" did not necessarily mean that the parties stipulated for a consideration separate and outside of the alleged purchase price of the lands, since a nominal consideration would satisfy the formal recital of consideration usually inserted in contracts.

3. The fact that plaintiff would make a large profit was not significant, since it could not be inferred, for the purpose of construing a contract to purchase into an option, that the stipulated price was unreasonable.

APPEAL from an order of the circuit court for Sauk county: E. RAY STEVENS, Circuit Judge. *Affirmed.*

This is an appeal from an order of the circuit court for Sauk county overruling the demurrer of the defendant *Winter* to the complaint of the plaintiff.

The complaint is as follows:

"(Title of Case.)

"The above-named plaintiff, appearing herein by its attorneys, complains of the defendants, and for cause of action alleges: That the plaintiff herein is a corporation duly organized and existing under and by virtue of the laws of the state of Wisconsin, doing business therein, with its principal place of business at the city of Baraboo, Sauk county, Wisconsin. That the defendant, *Emil Winter,* is a capitalist, residing at Pittsburg, Pennsylvania, who at the times hereinafter stated was a capitalist engaged in mining operations and in the purchase of lands and options in Sauk county, Wisconsin, and other localities, for the purpose of obtaining and holding mines and mining lands. That said defendant William C. Rodgers was at the times hereinafter stated a duly authorized representative and agent of said defendant *Emil Winter,* del-

egated with the power and authority to act for said *Winter* in matters pertaining to the transaction of the business of said *Winter* in the county of Sauk, and authorized to transact the business hereinafter more fully set forth. That heretofore and, to wit, on or about the 18th day of February, A. D. 1903, the plaintiff herein purchased of and from one John Koenig and Anna Koenig a certain option upon certain lands situate in Sauk county, Wisconsin, which said option was recorded in volume A of Options, page 5, Sauk county records, under which said option the plaintiff was to have the right to purchase of and from said John Koenig and Anna Koenig, his wife, the lands described therein for and at the agreed price of twenty-five thousand dollars ($25,000). That on or about the 26th day of February, A. D. 1903, the said first party purchased of and from one Henry Oetzmann a certain option upon certain lands and premises situate in Sauk county, Wisconsin, which option was recorded in volume A of Options, at page 36, Sauk county records, under which said option the plaintiff was to have and did have the right of purchasing the lands therein described upon the payment to said Henry Oetzmann of the sum of eight hundred ($800) dollars, and that heretofore, on or about the 26th day of February, 1903, the plaintiff purchased of and from one Fred Oetzmann and Margaret Oetzmann, his wife, a certain option upon certain lands described therein and situate in Sauk county, Wisconsin, which said option was recorded in volume A of Options, at page 37, Sauk county records, and under the terms of which said option the plaintiff was to have and did have the right to purchase said property therein described of and from said Fred and Margaret Oetzmann for the sum of three thousand two hundred ($3,200) dollars. That heretofore and on or about the 2d day of June, 1903, the said defendant *Emil Winter,* by his said agent, William C. Rodgers, duly made, entered into and delivered an agreement which was in words and figures as follows:

" 'This agreement, made and entered into this the second day of June, A. D. 1903, by and between the *Baraboo Land, Mining & Leasing Company,* a corporation organized and existing under and by virtue of the laws of the state of Wisconsin, with its principal place of business in the city of Baraboo, Sauk county, Wisconsin, party of the first part, and *Emil*

Winter, of the city of Pittsburg, Pennsylvania, party of the second part, witnesseth: That whereas, the said first parties are now the owners of, as vendees of certain leases and options upon certain lands in the town of Freedom and Westfield, Sauk county, Wisconsin, which said options are herein referred to as follows: A certain option executed by John Koenig and Anna Koenig, his wife, to the said first parties, which is recorded in volume A of Options, page number 5, and a certain option executed by Henry Oetzmann, and which said option is recorded in volume A of Options, at page 36, and upon a certain option executed by Fred Oetzmann and Margaret Oetzmann, his wife, and which said option is recorded in volume A of Options, at page 37, and which are thus referred to for the purpose of identification, the same as if the premises therein described and the terms and conditions therein stated were fully set forth in this agreement:

" 'Now, therefore, for a valuable consideration the said first parties do hereby grant, bargain, and sell, assign, set over, and deliver unto the said second party all of their right, title, and interest in and to the said options hereinabove described, upon the following terms and conditions, to wit: With the express understanding and agreement that this contract is to be in force for and during the period of nineteen months from the date hereof, and that on or before the expiration of said nineteen months the said second party is to pay to the said first parties for such options for all the lands described therein the sum of three hundred dollars for each and every acre thereof, said options to be taken collectively and the amount to be paid being for the sum of one hundred and ninety-four and three-fourths acres (194¾) of land, more or less, according to survey thereof, and not to be delivered or turned over to the said second party separately or alone; in other words, the whole one hundred and ninety-four and three-fourths acres to be taken and paid for at the rate of three hundred dollars per acre. At which time and upon the payment of which said sum the said first parties are to deliver to or cause to be delivered to the said second party a deed of the premises described in said options. It is understood herein that all liabilities attendant as on the option herein described, which are herein imposed upon the said first parties, are to be and are hereby assumed by said second parties.

"'In witness whereof the parties have hereunto set their hands and seals this the 2d day of June, A. D. 1903.

"'BARABOO LAND, MINING & LEASING CO.

[Corporate Seal.] "'By J. T. Gibson, Pres.

"'By S. A. Pelton, Sec.

"'EMIL WINTER,

"'Per William C. Rodgers.

"'Signed, sealed, and delivered in presence of

"'E. J. Battles,

"'Nettie Malloy.'

"That the options herein mentioned were the options above described. That at the time of making said agreement the said plaintiff had obtained and was the owner of the options therein described, and has complied with all the conditions which enabled and authorized them to enter into said agreement with the said defendants. That on the second day of January, 1905, the expiration of said period of nineteen months, referred to in the said contract, neither the said *Winter* nor the said defendant Rodgers was to be found in the said county of Sauk. That the plaintiff, by its officers and agents, went to the office of said Rodgers at Baraboo, Sauk county, but they were informed that he was not within the state of Wisconsin. That they were ready, able, and willing in all respects to comply with the said agreement above set forth, and were ready, able, and willing to deliver to the said defendants a deed of said premises and to pay to the respective parties named in said option the full consideration called for in said options, provided the said defendants were willing to carry out their said agreement. That on said 2d day of January, 1905, when the plaintiff found that said defendants were without the state, they telegraphed the said defendant *Winter* that the plaintiff stood ready to fully carry out its part of the contract made on June 2, 1903, and that they demanded compliance on his part and called for a reply. That they received no reply to said telegram until about January 18, 1905, when the plaintiff received a letter from said defendant *Winter* in which he stated that he had no knowledge of a contract or agreement made with the plaintiff, except an option, which had lapsed according to its terms. That the plaintiff also duly notified said Rodgers of its readiness in all respects to comply with said agreement, and the plaintiff has

on its part duly performed and complied with all the requirements of the said agreement.

"The plaintiff further alleges that it has at all times been ready, and now is ready and willing, to comply in all respects with the terms of said agreement and to deliver or cause to be delivered to them a deed of said lands, free from all incumbrances, and to convey to the defendants good and perfect title to all the premises described in said agreement, but that the said defendants have refused to carry out said agreement and have refused to pay the consideration therefor, and have repudiated the same, and the claim is now made by the defendants that the said defendant Rodgers was not in fact the agent of said *Winter* and was not authorized to make said agreement. The plaintiff further alleges, on information and belief, that the said defendants, for the purpose of avoiding and evading the terms of said agreement, sought to hinder and prevent the plaintiff from acquiring and obtaining such deeds as would enable the plaintiff to completely and fully carry out said agreement, and they sought to induce the persons who had given to the plaintiff the options named in the agreement to withhold their deeds and thereby prevent plaintiff from carrying out its agreement, and the defendants now pretend that the said options referred to in said agreement were never binding and that the said agreement never had any binding effect. That the plaintiff has been put to great expense and suffered great loss by reason of the failure of said defendant to carry out said agreement. That although the said defendants allege and pretend that said Rodgers was never authorized to make said agreement as agent for the defendant *Winter,* the plaintiff alleges, on information and belief, that he was so authorized, and that he represented himself as the agent of said defendant *Winter,* and both said defendants so conducted the business of said defendant *Winter* as to lead the plaintiff to suppose and believe that he was so authorized to act as his agent, and the plaintiff acted and relied on such conduct.

"Wherefore the plaintiff prays judgment for the sum of fifty-eight thousand four hundred and twenty-five dollars (58,425) against said defendants or either of them, or for such other sum as may be just, with interest and costs of suit."

The defendant *Winter* demurred to the complaint for failure to state facts sufficient to constitute a cause of action, and on other grounds not necessary to specify. The demurrer was overruled.

For the appellant there was a brief by *G. Stevens,* attorney, and *Olin & Butler,* of counsel, and oral argument by *H. L. Butler.*

For the respondent there was a brief by *Bentley & Kelley,* attorneys, and *Burr W. Jones,* of counsel, and oral argument by *Mr. F. R. Bentley* and *Mr. Jones.*

KERWIN, J. Whether the complaint states a cause of action is the question for determination upon this appeal. The other grounds of demurrer appear to have been abandoned, since they have not been urged either in brief of appellant or upon oral argument. Upon demurrer the facts set up in the complaint must be regarded as admitted; and the question is, Do they constitute a cause of action upon contract? The question turns on whether, under the allegations of the complaint, the plaintiff sold the options to defendant *Winter* and agreed to deed the lands covered thereby, in consideration of which defendant agreed to assume the liabilities under the options and pay $300 per acre for the land within nineteen months, or whether the contract between plaintiff and defendant was a mere option by which defendant had the privilege of buying within nineteen months but was under no obligation to do so. It is strenuously insisted by counsel for appellant that the transaction amounted to a mere option and that the complaint fails to show the existence of any contract of purchase, but, on the contrary, shows that the contract between the parties was in effect merely an option contract which lapsed without acceptance, and hence no liability accrued thereunder. The defendant's liability upon the facts admitted by the demurrer turns mainly upon the construction of the

contract set up in the complaint. The options to the plaintiff upon the lands covered by them confessedly gave it a valuable right. It was entitled under them to a conveyance of the property covered by the options upon compliance with the conditions thereof. This was a property right which the plaintiff could convey for a valuable consideration. It could perfect its title through the options and thereby acquire and convey title to the property. The main question, therefore, is, Did it contract to do so, or did it give appellant *Winter* an option to purchase?

The complaint alleges the ownership of the options and the contract with appellant. The contract provides that, for a valuable consideration, the plaintiff

"does hereby grant, bargain, and sell, assign, set over, and deliver unto the said second party all of their right, title, and interest in and to the said options hereinabove described, upon the following terms and conditions, to wit: With the express understanding and agreement that this contract is to be in force for and during the period of nineteen months from the date hereof, and that on or before the expiration of said nineteen months the said second party is to pay to the said first parties for such options for all the lands described therein the sum of three hundred dollars for each and every acre thereof, . . . in other words, the whole one hundred and ninety-four and three-fourths acres to be taken and paid for at the rate of three hundred dollars per acre. At which time and upon the payment of which said sum the said first parties are to deliver to or cause to be delivered to the said second party a deed of the premises described in said options."

The contract further provides that all liabilities attendant as on the options imposed upon the first parties are assumed by the second party. It is difficult to see how this instrument can be held to be an option to purchase. There is an express sale and transfer of the plaintiff's right, title, and interest in the options to defendant, and an assumption of liabilities thereunder by him, and an express promise to pay $300 per acre for each and every acre covered by the options on or be-

fore nineteen months from date of contract of sale, and a promise on the part of plaintiff to deed the lands to defendant. The agreement by express terms to pay is not optional, but is "with the express understanding and agreement . . . that the whole one hundred and ninety-four and three-fourths acres to be taken and paid for at the rate of three hundred dollars per acre" on or before nineteen months from the date of the contract. Nor is the provision that the contract is to be in force for nineteen months repugnant to or inconsistent with the express agreement to pay. It may have been inserted to emphasize the fact that the transaction was to be carried out within the period of nineteen months, and was doubtless surplusage. But it can easily stand with the express provisions of the contract. The words in the contract to the effect that the sale and delivery of the options is "upon the following terms and conditions" have reference, obviously, to the time and manner of payment and the assumption of liability on the part of the second party under the options. If the purpose was to grant an option and not make a contract to sell the option and real estate covered thereby, it seems a different instrument would have been executed. The contract in question upon its face has virtually none of the elements of an option. It in effect sells and delivers all the right, title, and interest of the first parties in the options to the second party on the terms and conditions that the contract shall be in force nineteen months, during which time the second party is to pay the first party for all the lands described in the options, being 194¾ acres at $300 per acre, the first party to deed the premises to second party at the time of payment. The covenants in the contract are mutual—on the part of the second party to buy, and on the part of the first party to sell. So we fail to see how it can be construed an option to purchase.

But it is claimed that the construction contended for by plaintiff results in an unreasonable and improbable business transaction, inconsistent with the language of the contract,

and renders its most important provisions meaningless and ineffective. In this connection stress is placed upon the fact that plaintiff was not the owner of the land; that possession was not delivered; that the contract was made upon a valuable consideration aside from the purchase price of the land; and that an enormous price was stipulated in the contract. This contention goes to the question of construction, and we fail to discover the significance attributed to it by counsel for defendant. It is contended that the options give no right of possession. True, it does not appear from the complaint whether the options give the right of possession or not. But this seems wholly immaterial. The contract of sale and agreement to deed the property to defendant was as effectual and binding as if immediate possession was agreed to be given. Whatever rights plaintiff had under the options were transferred, and, although plaintiff was not the owner of the lands, the options secured to it the right to acquire such ownership and transfer the title to defendant, which it agreed to do. The recital of a "valuable consideration" in the contract does not necessarily mean that the parties stipulated for a consideration separate and outside of the alleged purchase price of the land. It may have been intended as the formal recital of consideration usually inserted in contracts. A nominal consideration would satisfy the call. However, it cannot be inferred for the purpose of giving a different construction to the contract than it otherwise would have that the mere recital that the contract was made upon a valuable consideration means that some substantial consideration moved the parties to contract, independent of the mutual covenants stipulated expressly on both sides to be performed. So we do not think that the mere recital of a "valuable consideration" raises any inference that any consideration in fact was paid or to be paid other than the purchase price of the land. But, even if there was some other or additional consideration, it would not, in our opinion, alter the situation so far as the construction

of the contract is concerned. The contract on its face is either an option or a contract of sale and cannot be changed by construction.

Nor do we think the fact that plaintiff would make a large profit significant. The defendant doubtless agreed to pay what he regarded the property worth. At least, it cannot be inferred, for the purpose of construing a contract to purchase into an option, that the stipulated price was unreasonable.

It is argued by counsel that the explicit promise to take and pay for the whole 194¾ acres at $300 per acre means "in the event of purchase" the land is to be taken and paid for. But this is importing by construction into the contract words not found there, and which change the express agreement to purchase into a mere option to purchase, which we think by no rule of construction can be done.

We are cited to *Nelson v. Stephens,* 107 Wis. 136, 93 N. W. 163, as authority for appellant's position. But the words relied upon there were used in an extension of an option. There was no question but that the original instrument was a mere option, and it was held that, while the agreement extending the option contained words amounting to a promise to pay the consideration, still the subsequent agreement did not change the character of the option agreement, construing the option and the extension of it together. True, as argued by counsel for appellant, the intention of the parties must govern. "Courts give effect to contracts according to the intention of the parties—do not make them." But an intention cannot be read out of a contract contrary to the plain and ordinary meaning of the words. Effect must be given to all the provisions of the contract if they can stand together. Courts "cannot substitute a new contract for the one the parties see fit to make because nonperformance on the part of one of the parties thereto becomes difficult or the question of such nonperformance onerous." We confess the contract referred to in the complaint is not as clear and explicit as it might be,

but we think a cause of action is stated in the complaint, and therefore the court below was right in overruling the demurrer.

By the Court.—The order appealed from is affirmed.

TIMLIN, J., took no part.

DAHLMAN and another, Plaintiffs, vs. CITY OF MILWAUKEE and another, Appellants: BECK, Respondent.

January 8—January 29, 1907.

Municipal corporations: Public improvements: Special assessments: Actions to restrain enforcement: Parties: Pleadings: Cross-complaint: Street improvement tax certificates: Rights of certificate holder: Re-assessment: Judgment against municipality.

1. Where the primary right claimed by plaintiff is that his property is not legally chargeable with a special improvement tax which, in form, was imposed thereon and a certificate issued therefor and delivered to the contractor, the principal defendant necessarily is the municipality, it being the actor in imposing the tax and enforcing the same, to the plaintiff's injury by a sale of his property, and the contractor, as the owner of the tax claim, is a proper if not a necessary party defendant.
2. In such case, if the contractor had not been joined in the first instance, it would be the duty of the court to order him brought in under the mandatory rule of sec. 2610, Stats. 1898, and it would have been improper for the court to proceed to final judgment declaring the improvement certificate void without ordering him brought in, and the order bringing him in obeyed, whether either of the parties moved the court to that end or not.
3. The scope of the court's power, when a person is properly or necessarily joined with the main defendant in a suit in equity, is covered by sec. 2656*a*, Stats. 1898 (providing that a defendant may have affirmative relief against a codefendant, or a codefendant and the plaintiff, or a part of the plaintiffs, or a codefendant and a person not a party, or against such person alone, upon his being brought in; but that in all such cases such relief must involve or in some manner affect the contract, transaction, or property which is the subject matter of the action, and fur-

ther providing that the relief may be demanded in the answer, or by cross-complaint, for service of the pleading upon the party or person against whom the relief is demanded, and that unless affirmative relief is so claimed by a pleading so served none shall be adjudged), and sec. 2883 (providing, among other things, that a judgment may be given determining the ultimate rights of the parties on each side as between themselves).

4. Where a transaction involved in an action was the assessment of the benefits and damages as to plaintiff's property in respect to the improvement of a street and the validity of the determination as to the proportion of the cost thereof chargeable to plaintiff's land and the proportion payable otherwise, and the contractor defendant, to whom a special improvement certificate for the collection of the tax levied therefor was issued, by answer or cross-complaint claimed affirmative relief against his codefendant, the municipality, it is competent for the court to determine the ultimate rights of the two defendants in respect to the matter so far as such determination affected the transaction which was the subject matter of the action.

5. Sec. 1210*e*, Stats. 1898, as amended by ch. 354, Laws of 1903 (providing that, in any action to avoid a street improvement tax certificate, upon its being determined that the special tax is void for want of a proper assessment of benefits and damages, a stay of proceedings shall be granted to await the result of a valid assessment of benefits and damages, and that the property owner shall then pay into court, for the benefit of the parties entitled thereto, the amount so found chargeable to his property as a condition of his having a judgment for costs, and also that, upon failure to satisfy such condition, judgment dismissing his complaint with costs shall be rendered), plainly contemplates the existence of the right to invoke equity jurisdiction to prevent the sale of the land to collect an illegal tax, and regulates the remedy in connection with the re-assessment laws so as to do complete equity between the parties.

6. Sec. 1210*e*, Stats. 1898, as amended by ch. 354, Laws of 1903, is supplementary to sec. 1210*d*, as amended. The procedure differs as to the manner of enforcing payment of the amount determined by the re-assessment proceedings to be chargeable against the property, but the right of the holder of an invalid street improvement certificate, upon a valid assessment of benefits and damages being made, showing the amount for which a certificate should have been issued, to recover the whole amount called for by such invalid certificate, part on account of the property involved and part out of the proper fund, is absolutely secured to the certificate holder by sec. 1210*d*.

7. Under sec. 1210*e*, Stats. 1898, the court is not limited as to grantable relief to that specified in that section.
8. Sec. 1210*e*, Stats. 1898, does not militate against the requirements of sec. 2610, as to the necessity of making the certificate holder a party defendant in a suit to set aside the certificate, nor sec. 2656*a*, as to settling the rights of codefendants between themselves and granting appropriate relief accordingly upon proper pleadings claiming the same.
9. A city charter provided that any person who shall have contracted with the city to do street improvement work to be paid for from special assessments upon the abutting property shall have no claim against the city in any event except for the proceeds of the special assessment; that no work proper to be paid for by such assessments shall be contracted to be paid for in any other way; that such work shall be contracted to be paid for in special assessment certificates so far as the benefits to the parcels of land respectively abutting on the street improved properly assessable to such lands will go for that purpose; and that the balance as to each parcel shall be paid out of ward funds. The contract under which a certain street improvement was made provided that the contractor receive special assessment certificates in payment and satisfaction of his work to the extent the amounts thereof would go in liquidation of the same without any other claim upon or liability of the city on account of any amount included in such certificates. *Held*, that such charter provisions and such contract were subject to the re-assessment laws, which in effect amended the city charter and are constitutional and effective.
10. In such case the charter provisions and the re-assessment statutes supplementing the same secured to the contractor a right to receive of the city the difference between the contract price of the improvement in front of any parcel of land affected and the amount properly chargeable thereto, according to a valid ascertainment of the same, as provided in the charter, in case of the initial determination failing for want of a proper determination of benefits and damages.
11. In such case the rights of the contractor and municipality result in this rule: In case of an invalid determination of the net benefits accruing to a parcel of land abutting on a street by reason of the improvement thereof, the cost of the improvement being payable to the contractor, to the extent of the net benefits to such property, by a special assessment certificate issued against the same and the balance by the municipality, and the work having been done and a proper certificate, in form, issued to the contractor, and the owner of the land commencing an

action to set aside the certificate because of failure of the municipal authorities to properly ascertain the net benefits to the land,—the owner of the certificate should be made a party defendant, and the rights of the plaintiff as to both defendants and the rights of the latter as between themselves should be settled by a final judgment, and in case it is determined, in the manner provided by law, that the amount charged against plaintiff's property for the improvement is excessive, and the excess determined, judgment therefor should go against the municipality in favor of the contractor, if properly claimed in the latter's pleading.

APPEAL from a judgment of the circuit court for Milwaukee county: OREN T. WILLIAMS, Circuit Judge. *Affirmed.*

Action to enjoin the sale of land for nonpayment of a street improvement tax.

The city of *Milwaukee,* which imposed the special tax, and the owner of the certificate, *C. Beck,* who did the work as contractor, were joined as defendants. The claim of the plaintiffs was that the assessment was invalid because made on an arbitrary basis of $6 per front foot for benefits regardless of damages, the assessing board well knowing, as the fact was, at the time of making the assessment that the contemplated improvement would result in making a deep cut in front of plaintiffs' property, greatly damaging the same, while the law only permitted the cost to the excess of benefits accruing to the property over damages thereto to be charged against such property.

The allegations of the complaint appear with sufficient detail for a full understanding of the case by the abridgment of the findings hereafter referred to.

The city answered the complaint, putting in issue all the allegations as to the claim above mentioned, and pleaded the pendency of an action at law between plaintiffs and the city in the circuit court for Milwaukee county to recover damages alleged to have been caused to plaintiffs' property by the alleged unlawful improvement.

The defendant *Beck* answered by way of cross-complaint and prayed that in case of the tax being declared void a reassessment should be made under ch. 354 and ch. 276, Laws of 1903, and that the difference between the amount of the void certificate and the proper amount chargeable to the plaintiffs' premises on account of the improvement should be adjudged in defendant's favor against the city. The latter did not plead to such cross-complaint.

Omitting formal matters and those which are not in controversy or are not necessary in deciding the case, the facts as determined by the court are substantially as follows: The city of *Milwaukee* had authority by its charter to improve the street in question in a prescribed manner. The defendant, *C. Beck,* duly contracted with the city to improve such street as alleged in the complaint. March 10, 1902, for the purpose of a foundation for making the improvement the board of public works of such city submitted to its common council a resolution to grade and macadamize the roadway, pave the gutters, and grade, curb, and plank the sidewalks on National avenue, the street in question, from Washington avenue to Thirty-fourth avenue in the Twenty-third ward of said city, which was referred to the local committee of the ward. Subsequently it was amended by substituting the words "Thirtieth avenue" for "Thirty-fourth avenue" and adopted. The engineer's estimated cost of the improvement in front of plaintiffs' property was $4,239.12 and the actual cost was $5,062.92. There was issued to the contractor a certificate against the premises for $4,250 and one against the ward fund for $812.92. The estimated cost of the improvement throughout its whole course varied from $96.15 to $231.75 for a 30.10 foot lot. June 30, 1902, the board of public works aforesaid transmitted to said common council duplicate assessments of benefits and damages for making the improvement as set forth in the complaint, showing that such benefits were assessed by the frontage rule instead of according to the

excess of benefits over damages as to each parcel of land. On said day the assessment was confirmed by said council and is the sole basis for the tax in question. Plaintiffs' premises are on the crest of a natural elevation. The surface of the east line is 6.69 feet and at a point 337 feet west 53.1 and at the west line 0.6 feet above the sidewalk level, which level at a point thirty-seven feet west of the east line of the premises is 3.15 feet and at a point 300 feet west thereof 5.55 and at the west line 2.15 feet above the roadway. The established grade of the street in front of such premises is from five and one-half to sixteen and one-half feet below the natural surface thereof and of said premises. To grade such premises, so as to make them conform to the grade of the street, back from the street line 150 feet would cost more than $5,200. The city was benefited by the improvement to the extent of the cost thereof. The certificate issued to the contractor is now owned by him. It was issued on the uniform basis of $6 per front foot, that being the basis of assessments along the whole street so far as the same was improved. The board of public works in making the assessment did not consider the benefit and injury which might result to each lot or parcel of land from the improvement, nor consider nor determine the effect of the improvement as to each lot separately, nor the cost thereof, nor consider and assess the benefits and injuries or either of them as to each parcel of land as a separate matter. The assessment was based on the estimated cost of the entire work as if each parcel of land was equally affected.

From such findings the conclusion was reached that the special tax for want of a proper assessment of benefits and damages as to plaintiffs' premises was void, and that defendant *Beck* was entitled to receive of the defendant city by way of a special assessment against plaintiffs' premises such part of $4,250 as should be by due proceedings to that end determined to be legally chargeable thereto and to receive of the defendant city the balance of said sum with interest upon the

whole of such sum from the time the same was payable to said *Beck,* to wit, November 24, 1904, and that the final judgment should declare the certificate for $4,250 void and award plaintiffs full costs, and that further proceedings should be stayed to wait the result of a new assessment of benefits and damages according to the statutes on that subject, which was ordered to be made forthwith.

An interlocutory judgment was rendered accordingly.

A new assessment of benefits and damages was thereafter made as ordered by the court, which was confirmed by the common council of the defendant city and conceded by plaintiffs to be regular, though excepted to by them as to the damages to the premises as determined.

The court, upon such new assessment of benefits and damages being completed and confirmed as aforesaid and proof thereof being duly made, filed final findings in harmony with the preliminary decision, and further to this effect: According to the re-assessment of benefits and damages to which no objection is made by plaintiffs going to the regularity thereof, no benefits accrued or were assessable to the plaintiffs' premises by reason of the improvement of the street in front of their premises.

Judgment was accordingly ordered decreeing the certificate issued to defendant *Beck* on the first assessment void and requiring it to be delivered up for cancellation, awarding him $4,250 against the defendant city with interest thereon from November 23, 1904, and awarding plaintiffs full costs against said city, and said *Beck* full costs likewise. Such judgment was duly rendered, from which this appeal was taken.

For the appellants there was a brief by *John T. Kelly,* city attorney, and *Clinton G. Price,* assistant city attorney, and oral argument by *Mr. Price.*

For the respondent there was a brief by *Turner, Hunter & Goff,* and oral argument by *C. F. Hunter.*

MARSHALL, J. The primary right claimed by plaintiffs is that their property was not legally chargeable with the improvement tax which, in form, was imposed thereon and a certificate issued therefor and delivered to respondent. The principal defendant necessarily was the city of *Milwaukee,* it being the actor in imposing the tax and in enforcing the same, to the plaintiffs' injury by a sale of the property. Respondent *Beck,* as the owner of the tax claim, was a proper, if not a necessary, party defendant. It would seem, since the city in case of plaintiffs prevailing could not proceed to enforce the tax for the benefit of *Beck,* that he was a necessary party. If he had not been joined in the first instance it is quite clear that it would have been the duty of the court to order him brought in under the mandatory rule of sec. 2610, Stats. 1898, which provides that "when any persons not parties to the action have such interests in the subject matter of the controversy as to require them to be made parties for their due protection, the court shall order them to be brought in." As this court has previously, in principle, decided, had *Beck* not been made a party at the outset or before trial, it would have been improper for the court to proceed to final judgment declaring the improvement certificate void without ordering him brought in, and the order being obeyed, whether either of the parties moved the court to that end or not. *McDougald v. New Richmond R. M. Co.* 125 Wis. 121, 129, 103 N. W. 244.

The scope of the court's power when a person is properly or necessarily joined with the main defendants in a suit in equity is covered by secs. 2656*a* and 2883, Stats. 1898. The first section provides:

"A defendant . . . may have affirmative relief against a codefendant, or a codefendant and the plaintiff, or part of the plaintiffs, or a codefendant and a person not a party, or against such person alone, upon his being brought in; but in

all such cases such relief must involve or in some manner affect the contract, transaction or property which is the subject matter of the action."

It further provides that the relief may be demanded in the answer or by cross-complaint, and for service of the pleading upon the codefendant against whom the relief is demanded, and that unless affirmative relief shall have been so claimed by a pleading so served none shall be adjudged. The latter section provides that a "judgment may be given . . . determin[ing] the ultimate rights of the parties on each side, as between themselves." Thus it will be seen that since respondent by answer or cross-complaint claimed affirmative relief against his codefendant, the appellant, it was competent for the court to determine the ultimate rights of the two in respect to the matter so far as such determination affected the transaction which was the subject matter of the action. That such transaction was the assessment of benefits and damages as to the plaintiffs' property in respect to the improvement of the street in question and the validity of the determination as to the proportion of the cost of such improvement chargeable to plaintiffs' land and the proportion payable otherwise, does not seem to be open to reasonable controversy.

The rule laid down in *Kollock v. Scribner,* 98 Wis. 104, 73 N. W. 776, that where a defendant in equity pleads a cause of action against a codefendant which would, independently of the main cause, be a proper ground of complaint at law against such codefendant, though so far germane to such principal cause, in case of that being a good one, as to be presentable therewith,—if it be held not good and the complaint be dismissed on that ground the dismissal will carry the incidental cause with it, does not apply here. The main cause in the case in hand was held good and the full relief demanded by plaintiffs was substantially granted. The mere fact that there was a re-assessment of benefits and damages under a law providing therefor, and that a valid assessment

of benefits and damages in the first instance was not, in view of the re-assessment statutes, a condition precedent to grading the street so that a failure to make a valid assessment at first was not irremediable as regards the liability of the city for damages, did not militate against plaintiffs' invoking equity jurisdiction to prevent the sale of their land to collect the illegal tax. Sec. 1210*e*, Stats. 1898, as amended by ch. 354, Laws of 1903, plainly contemplates the existence of the right to use such jurisdiction and regulates the remedy in connection with the re-assessment law so as to do complete equity between the parties, in that it provides, in any action to avoid a street improvement tax certificate upon its being determined that the special tax is void for want of a proper assessment of benefits and damages, for a stay of proceedings to await the result of a valid assessment of benefits and damages and for the property owner then paying into court "for the benefit of the parties entitled thereto" the amount so found chargeable to his property as a condition of his having a judgment for costs, and provides that upon failure to satisfy such condition judgment dismissing his complaint with costs shall be rendered.

On the question of whether sec. 1210*d*, Stats. 1898, as amended and found at ch. 276, Laws of 1903, and sec. 1210*e*, Stats. 1898, as amended by ch. 354, Laws of 1903, apply to the re-assessment made in this case, the cause is ruled by *Dahlman v. Milwaukee*, 131 Wis. ——, 110 N. W. 479 (opinion by Mr. Justice WINSLOW). What is said in that case renders it unnecessary to discuss the subject in this opinion and unnecessary to point out that in this language in said ch. 276, "and the excess in the amount of such valid certificate over such new certificate, if any, shall be paid to said holder, or person, out of the proper fund," the word "valid" should be read "invalid," that clearly having been the intent of the legislature. See ch. 501, Laws of 1905.

Sec. 1210*e*, as amended, is supplementary to sec. 1210*d*,

as amended. The procedure in the former differs from that in the latter, as to the manner of enforcing payment of the amount determined by the re-assessment proceedings to be chargeable against the property, but the right of the holder of an invalid street improvement certificate, upon a valid assessment of benefits and damages being made, showing the amount for which the certificate should have been issued, to recover the whole amount called for by such invalid certificate, part on account of the property involved and part "out of the proper fund," seems to be absolutely secured to the certificate holder by the latter section. It provides, generally, that when any special assessment certificate is invalid for failure to make a proper assessment of benefits and damages the city authorities shall proceed to make a new assessment of benefits and damages in the manner provided by law. Sec. 1210*e*, Stats. 1898, as amended, among other things, provides that when in any action to set aside a special assessment certificate the court shall determine that the assessment is invalid because of a defective assessment of benefits and damages the proper city authorities shall proceed to make a new assessment of benefits and damages as required by law, etc., thus recognizing the duty imposed by sec. 1210*d*. The re-assessment as regards the ultimate rights of the parties interested is quite clearly intended to be the same whether it is made by order of the court in an action, or independently thereof, though the proceedings to enforce such rights are somewhat different in one case than in the other. In either the property holder is directly or indirectly held liable for the amount chargeable to his land for the benefit of the contractor making the improvement, and the latter is protected as to the balance the same as he would have been if a valid assessment of benefits and damages had been made in the first instance, by the difference between the amount chargeable to the property and the contract price for the work of making the improvement in front of the same to the center of the street being made "payable out of the proper fund."

True sec. 1210*e*, Stats. 1898, as amended, as counsel for the appellant contend, makes no mention of relief grantable to the contractor, except as to the amount of the invalid improvement certificate properly chargeable to the land against which it was issued. But just as true, as an original matter, it does not confer the right to recover of the property owner or out of his land the amount legitimately chargeable to such land as determined by the re-assessment. That properly speaking is secured by sec. 1210*d*. The supplementary section only provides a method of enforcing collection of it, viz.: by declaring that the property owner shall make payment into court for the benefit of the parties entitled thereto as a condition of final relief in the action.

We cannot agree with counsel for appellant that the court in dealing with this subject, in equity, is limited as to grantable relief to that specified in sec. 1210*e*. It by no means militates against the requirements of sec. 2610 as to the necessity for making the certificate holder a party defendant in the suit to set aside the certificate nor the other section to which we have referred as to settling the rights of codefendants between themselves and granting appropriate relief accordingly upon proper pleadings claiming the same. If respondent had a right, as shown by the result of the re-assessment proceedings, to recover the difference between the amount called for by the invalid certificate and the amount found justly and legally chargeable to plaintiffs' land, a settlement of the rights of defendants between themselves under sec. 2610 of the Statutes required that fact to be adjudicated, and affirmative relief in respondent's favor against his codefendant in response to secs. 2656*a* and 2883 of the Statutes to which we have referred required the entry of judgment in accordance with such fact.

Counsel for appellant call attention with much confidence to these facts as fatal to the judgment: First, sec. 21, ch. V, of the city charter of the city of *Milwaukee* provides that any person who shall have contracted with the city to do street improvement work and to be paid for from special assessments

upon the abutting property shall have no claim against the city in any event except for the proceeds of the special assessments, and that no work proper to be paid for by such assessments shall be contracted to be paid for in any other way, and sec. 10, ch. VII, of such charter provides that street improvement work of the sort involved in this case shall be contracted to be paid for in special assessment certificates so far as the benefits to the parcels of land respectively abutting on the street improved properly assessable to such lands will go for that purpose, and that the balance as to each parcel shall be paid out of the fund of the ward in which such parcel shall be situated; second, the contract between respondent and the appellant was to the effect that the latter would receive special assessment certificates in payment and satisfaction of his work to the extent that the amounts thereof would go in liquidation of the same without any other claim upon or liability of the city on the contract for any amount included in such certificates; third, it has been repeatedly decided by this court that where street improvement work, according to the provision of the city charter where the same is done, can be paid for only in special assessment certificates against the abutting property, the person doing such work takes all the risk of the regularity of the proceedings in respect to making the special assessments and has no claim whatever against the city in case of the special taxes being uncollectible by reason of the assessments failing for any reason; that he is without any remedy whatever against the city, it not being responsible for the validity of its proceedings, and only being, in contemplation of law, the agent of the owner of the certificates to collect the same so far as the charter makes provision in that regard. On this counsel cite many cases, the most significant of which are *Eilert v. Oshkosh,* 14 Wis. 586; *Fletcher v. Oshkosh,* 18 Wis. 228; *Hall v. Chippewa Falls,* 47 Wis. 267, 2 N. W. 279; *Zwietusch v. Milwaukee,* 55 Wis. 369, 13 N. W. 227; *Hoyt v. Fass,* 64 Wis. 273, 25 N. W. 45; *Heller v. Milwau-*

kee, 96 Wis. 134, 70 N. W. 1111, and *Roter v. Superior,* 115 Wis. 243, 91 N. W. 651.

The two sections of the *Milwaukee* city charter referred to should be read together as part of the general scheme for doing street improvement work by contract, the cost thereof in front of each parcel of land abutting on the street improved to the center thereof to the extent of the net benefits thereto accruing by the improvement to be paid by the owner of such parcel and the balance to be paid by the city out of the fund of the ward in which the land is located. No work proper to be paid for by special assessment certificates shall be contracted to be paid for in any other way, is the command of the charter, but no work is proper to be paid for by such certificates except to the extent of the net benefits accruing to the parcels of land respectively fronting on the street improved. True the charter declares, as we have seen, that the contractor agreeing to take his pay in special assessment certificates shall have no claim against the city on account of his work except for the collection of such certificates, but that does not militate against the execution of any corrective law designed to determine the proper amount of such benefits in case of the original determination being inefficient and the enforcement of the rights of the contractor as thus readjusted.

True also the contract between the respondent and the appellant, following the requirements of the charter, bound the former to take special assessment certificates in payment of his work to the extent of the net benefits accruing thereby to the parcels of land fronting on the street improved, but that, too, did not preclude his having the benefit of any law designed to determine the amount of such benefits in case of the initial determination being ineffective. True also, as this court has frequently decided, and it is the settled law, where the cost of street improvement work is payable only by special assessments against the abutting property, failure of the assessments for neglect to comply with the law in making the

same does not render the city liable to the contractor, but such rule manifestly does not stand in the way of the execution of a valid law providing for an efficient ascertainment of the amount chargeable to the parcels of land abutting on a street improved in case of the initial assessment failing. Moreover, that has nothing whatever to do with the subject of municipal liability for the cost of street improvement work not chargeable to the abutting property.

The provisions of the city charter to which we have referred and the contract between respondent and appellant are subject to the re-assessment laws, which are in effect amendments to the city charter. Such manifestly is the legislative plan. That such laws are constitutional and effective as designed by the lawmaking power is not open to reasonable controversy at this time. As was said in *Sanderson v. Herman,* 108 Wis. 662, 669, 84 N. W. 890, 85 N. W. 141:

"The authority in our own state is overwhelming in support of laws authorizing re-assessment both of general taxes and of special assessments. There can be no doubt that the legislature has power to ratify imposition or direct re-assessment of taxes which it might originally have authorized. . . . If it be urged that conditions required by the charter originally cannot now be complied with,—such, for example, as the ascertainment of benefits and damages cannot now precede the letting of the contracts, as was obviously the policy of the charter,—it is a complete answer that the legislature might originally have authorized a special assessment without making such ascertainment an essential preliminary to contracting."

Without further discussion we may well conclude, in harmony with *Haubner v. Milwaukee,* 124 Wis. 153, 101 N. W. 930, 102 N. W. 578; *Pabst B. Co. v. Milwaukee,* 126 Wis. 110, 105 N. W. 563; and *Dahlman v. Milwaukee,* 131 Wis. ——, 110 N. W. 479, that the plain purpose of the re-assessment laws under consideration was to provide a remedy, in case of special assessments to pay for street improvements

proving uncollectible after the doing of the work, for an efficient readjustment of the rights of the three parties concerned: the municipality, the property owner, and the contractor. That was very distinctly held in *Haubner v. Milwaukee, supra,* it being said, in effect, that while sec. 1210*e* only requires the property owner to pay into court the amount justly chargeable to his land according to the re-assessment, the rights of the contractor are also involved and are to be deemed the same as in case of an appeal by the property owner, under the charter provision on the subject, from the determination as to the amount chargeable to his land for net benefits accruing from the improvement: that is, after taking account of the net benefits, as finally determined, the difference between the amount charged in the illegal certificate and the proper amount is payable "by the city out of the proper ward fund." Sec. 11, ch. VII, Milwaukee Charter. In harmony therewith in *Pabst B. Co. v. Milwaukee, supra,* it was said:

"The amount of the assessment, if illegally arrived at in the beginning, may be changed to the proper amount by re-assessment proceedings."

It must necessarily follow, and such, it seems, is in effect expressly provided for in sec. 1210*d,* as amended, that if the amount payable by the city is illegally arrived at in the beginning it may be changed to the proper amount by the re-assessment proceedings and collected accordingly.

So, as we must conclude, the charter of the city of *Milwaukee* and the re-assessment statutes supplementing the same secured to the respondent the right to receive of the appellant the difference between the contract price of the improvement in question in front of plaintiffs' property and the amount properly chargeable thereto, according to a valid ascertainment of the same, as provided in the charter, in case of the initial determination failing for want of a proper determination of benefits and damages. We are not troubled in this case with

any question of retroactive legislation, since the re-assessment statutes existed at the time the contract involved was made and form a part thereof as effectively as if referred to therein. We should say in passing that it is not intended by this to suggest that the right of the respondent would be different if the situation were otherwise.

The right of respondent being as indicated, the judgment complained of goes no further than to fully vindicate it. The court in accordance with settled principles of equity jurisprudence, as embodied in sec. 2610 and sec. 2883 of the Statutes, determined the ultimate rights of defendants between themselves and granted the proper affirmative relief prayed for by a proper pleading under sec. 2656*a* of the Statutes.

The result of the foregoing as a rule is this: In case of an invalid determination of the net benefits accruing to a parcel of land abutting on a street by reason of the improvement of such street, the cost of the improvement being payable to the contractor, to the extent of the net benefits to such property, by a special assessment certificate issued against the same and the balance by the municipality, and the work having been done and a proper certificate, in form, issued to the contractor, and the owner of the land commencing an action to set aside the certificate because of failure of the municipal authorities to properly ascertain the net benefits to his land,—the owner of the certificate should be made a party defendant and the rights of the plaintiff as to the defendants and the rights of the latter as between themselves should be settled by the final decree, and in case of its being determined, in the manner provided by law, that the amount charged for the improvement against the plaintiff's property is excessive, and the excess determined, judgment therefor should go against the municipality in favor of the contractor, if properly claimed by the latter's pleading. Such was the course pursued in this case.

By the Court.—The judgment is affirmed.

STEFFEN, Appellant, vs. SUPREME ASSEMBLY OF THE DEFENDERS, Respondent.

January 8—January 29, 1907.

Compromise and settlement: Impeachment: Trial: Direction of verdict: Fraud: Mistake: Appeal and error: Review.

1. An agreement of settlement expressed in a written release is a complete defense unless impeached for fraud or mistake.
2. To accomplish impeachment of a formal written instrument on the ground of fraud or mistake the proof must be clear and convincing beyond reasonable controversy.
3. A writing, and testimony offered by a defendant, showing that plaintiff deliberately and with full knowledge entered into an agreement to settle plaintiff's claims, is not enough to warrant the direction of a verdict in defendant's favor if plaintiff's evidence, standing alone and undisputed, can, within reason, be deemed sufficient to prove with the requisite clearness and conclusiveness that the signature to the writing was induced by fraud or mistake.
4. Plaintiff's testimony, upon which alone her case in respect to an alleged compromise and settlement of a claim under a benefit certificate rested, was to the effect that the president of defendant benefit society told her that he had information showing that statements of deceased as to freedom from consumption, from which he afterwards died, were false, and that, as a lawyer, he did not believe any fair jury would award her anything; that the defendant was not liable to her at all, but that he was willing to give her $100 as a present; that though she at first demurred she finally assented, and that thereupon the president drew or dictated a paper, went with her to a bank, got the money and told her to sign the paper, which she did without reading it, supposing it to be a mere receipt for the $100. *Held*, that the evidence, though given the fullest credit, did not justify a finding by the jury that plaintiff's signature to the writing was induced either by fraud or mistake in the legal sense: (1) not by fraud, for there was no misrepresentation to her as to the terms of the writing; (2) not by mistake, for the law does not allow a plea of mistake as to the contents of a written instrument which the signer has full opportunity to read but neglects to, unless deterred by some act or representation of the other party.
5. In such case the evidence is *held*, at most, to indicate that the prior negotiations and conversations proceeded upon the basis

of a gift instead of a settlement, but that all such negotiations became merged in the written expression of the agreement finally executed, which became the conclusive and exclusive proof of the contract upon which the minds of the parties met and to which they were bound.

6. Where a defense is conclusive in favor of the judgment sought to be reviewed, whether or not errors were committed in ruling upon other issues in the cause, and assignments of such errors, need not be considered.

APPEAL from a judgment of the circuit court for Dane county: B. F. DUNWIDDIE, Judge. *Affirmed.*

Action upon a benefit certificate held by plaintiff's deceased husband in defendant association. Defense, fraud in application of the assured in representing himself in good health and free from pulmonary trouble, when, in fact, at the time of the application he was suffering from tuberculosis, from which he died six months later. Also, a settlement and written release after the death and after proofs of loss by the plaintiff. The trial court directed a verdict for the defendant, without indicating which of the defenses he found conclusively sustained by the evidence. From judgment upon such verdict the plaintiff appeals.

For the appellant the cause was submitted on the brief of *F. K. Shuttleworth,* and for the respondent on that of *Smith & Rogers.*

DODGE, J. The agreement of settlement expressed in the written release is, of course, a complete defense unless impeached for fraud or mistake. *Jackowski v. Ill. S. Co.* 103 Wis. 448, 79 N. W. 757; *Kowalke v. Milwaukee E. R. & L. Co.* 103 Wis. 472, 480, 79 N. W. 762. To accomplish impeachment of a formal written instrument on such grounds the proof must be clear and convincing beyond reasonable controversy. *Linde v. Gudden,* 109 Wis. 326, 85 N. W. 323; *Meier v. Bell,* 119 Wis. 482, 485, 97 N. W. 186; *Burnham v. Burnham,* 119 Wis. 509, 513, 97 N. W. 176; *Bowe v.*

Gage, 127 Wis. 245, 251, 106 N. W. 1074. The paper itself, and the testimony offered by defendant, show that plaintiff deliberately and with full understanding entered into an agreement to settle her claims for the sum of $100, but this is not enough to warrant the direction of verdict if plaintiff's evidence, standing alone and undisputed, can, within reason, be deemed sufficient to prove with the requisite clearness and conclusiveness that her signature to the writing was induced by fraud or mistake. Her testimony, upon which alone her case in this respect rests, was to the effect that the president of defendant told her that he had information showing that statements of deceased as to freedom from consumption were false, and that, as a lawyer, he didn't believe any fair jury would award her anything; that the defendant was not liable to her at all, but that he was willing to give her $100 as a present. To this she made demur that defendant ought not to have received her husband into membership if it were not going to pay his insurance, but finally assented. Thereupon the president drew or dictated a paper, went with her to a bank, got the money, and told her to sign this paper, which she did without reading it, supposing it to be a mere receipt for $100. We agree with the trial court that this evidence, though given the fullest credit, could not have justified a finding by the jury that plaintiff's signature to the writing was induced by either fraud or mistake in the legal sense; clearly not by fraud, for there was no representation to her as to the terms of the writing; not by mistake, for the law does not allow a plea of mistake as to the contents of a written instrument which the signer has full opportunity to read but neglects to, unless deterred by some act or representation by the other party. *Straker v. Phenix Ins. Co.* 101 Wis. 413, 421, 77 N. W. 752; *Deering v. Hoeft,* 111 Wis. 339, 343, 87 N. W. 298; *Bostwick v. Mut. L. Ins. Co.* 116 Wis. 392, 413, 89 N. W. 538, 92 N. W. 246. Plaintiff's evidence shows nothing of such acts. It at most indicates that the prior ne-

gotiations and conversation proceeded upon the basis of a gift instead of a settlement, but all such negotiations became merged in the written expression of the agreement finally executed, and that becomes the conclusive and exclusive proof of the contract upon which the minds of the parties met and to which they are bound. *Conant v. Estate of Kimball,* 95 Wis. 550, 70 N. W. 74; *Jost v. Wolf, ante,* p. 37, 110 N. W. 232.

The defense above considered is conclusive in favor of the judgment. Whether or not errors were committed in rulings upon the trial of other issues in the case, and assignments of such errors, needs no consideration.

By the Court.—Judgment affirmed.

BUHLER, Appellant, vs. SMITH, Executrix, Respondent.

January 8—January 29, 1907.

Landlord and tenant: Eviction.

1. Where a tenant, as part of his covenants, agreed to build a tobacco shed, and the landlord gave notice to a lumber dealer, with whom the tenant was negotiating for material for the shed, that he was the owner of the premises and would not pay for the material to be so furnished, the landlord was within his rights, and the fact that the lumber dealer thereafter refused to furnish and sell to the tenant the material under arrangements theretofore made did not prevent the tenant from securing the necessary material from the dealer upon other conditions, or from purchasing it in the open market.
2. Such acts on the part of the landlord did not constitute a breach of the lease or grounds for its abandonment by the tenant.

APPEAL from a judgment of the circuit court for Dane county: E. RAY STEVENS, Circuit Judge. *Affirmed.*

Plaintiff sues to recover for breach of a lease and option contract. It appears that on January 4, 1904, plaintiff made

a contract with W. J. Smith, now deceased, by which Smith agreed to lease and sell plaintiff a farm. The lease was for five years with an option to purchase. It fixed the amount to be paid annually by plaintiff, and what part of the sum was to be applied as a payment for the option and to be credited on the purchase price of the farm should plaintiff elect to purchase the property under the agreement. Among the obligations assumed by plaintiff he agreed "to make improvements during the first year as follows: to build a tobacco shed twenty-seven (27) feet by one hundred and twelve (112) feet, eighteen (18) foot posts; to build a kitchen on the house he occupies, sixteen (16) feet by eighteen (18) feet, on fourteen (14) foot posts." Plaintiff went into possession of the premises in January, 1904, and cultivated the farm for that season. He paid Smith two of the monthly instalments under the contract, and he alleges that he arranged an extension of time of payment for the instalments due after March 1, 1904, to such time in the latter part of the year as he should realize on his crops. He built the kitchen in part during the earlier portion of the season, made arrangements for the purchase of the necessary lumber for the tobacco shed, and by starting the foundation and piers undertook its construction. It appears that Smith, through his attorney, at this time notified the lumber dealer with whom plaintiff had arranged to furnish the lumber for the tobacco shed that he (Smith), as owner of the land, would not be responsible for the cost of such material should plaintiff fail to pay for it, and forbade plaintiff's employees to construct the foundation of the shed on which they were then engaged, threatening them with arrest if they continued the construction of the shed on the premises. Plaintiff was not present at the time of such interference with the employees. The employees continued in the work of building the foundation throughout that day, and then communicated to plaintiff the action taken by Smith to prevent the erection of the shed. After Smith had notified

the lumber dealer that he would assume no responsibility for the cost of the lumber for the tobacco shed which plaintiff intended to erect on the farm and had forbidden plaintiff's employees building the foundation, plaintiff negotiated with the lumber dealer for the purchase of this material, but failed to make such purchase, and therefore abandoned the undertaking to build the tobacco shed. He thereafter notified Smith's attorney and representative that he would move off the premises in the following December or January, after having harvested the season's crop. To this Smith assented. Plaintiff removed from the premises at the end of the first year's tenancy. Collection of the unpaid monthly instalments was enforced by litigation. Plaintiff prosecutes this action as a claim for damages against the estate of W. J. Smith, now deceased, upon the ground that through the acts of Smith in his lifetime, resulting in his damage, he was compelled to abandon the contract of lease and option.

For the appellant the cause was submitted on the brief of *F. K. Shuttleworth,* and for the respondent on that of *Smith & Rogers.*

SIEBECKER, J. The evidence shows that the plaintiff removed from the premises at the conclusion of the first year's tenancy created by the lease. He claims to have abandoned the lease and contract upon the ground that he was prevented by the lessor, W. J. Smith, now deceased, from fulfilling the obligations provided for by the contract in respect to the building of a tobacco shed. The failure to build the tobacco shed is claimed to have materially impaired the use of the farm. It is averred that Smith prevented the construction of this shed by interfering with the delivery of the lumber which plaintiff had purchased to build the shed by forbidding the construction of the building on the premises and by threatening to invoke legal proceedings to stop plaintiff and his employees should they persist in the effort to build it as they

had undertaken to do. The evidence adduced shows that plaintiff had bargained for lumber from which to build this shed, and that the dealer was about to deliver it when Smith notified the seller of this material that plaintiff was in possession of the premises as lessee, and, if such material were sold and delivered to the plaintiff to be used on the premises, that he must look to plaintiff for the purchase price, and that he, the lessor, would not deem himself obligated therefor. At this time, or immediately preceding the giving of this notice, the lessor personally gave notice to plaintiff's employees engaged in building the shed that he objected to its erection, and he threatened to stop them through legal proceedings if plaintiff persisted in building it. Plaintiff was informed of this conduct of the lessor and no further work was done on the foundation. Thereafter plaintiff and the lumber dealer had negotiations for the sale of the lumber for which plaintiff had originally bargained, but they failed to agree upon any terms upon which the dealer would sell and deliver it. Nothing was done to obtain the material elsewhere by plaintiff.

It is clear that this difficulty between the parties arose because the lessor deemed himself liable for the cost of the lumber if it should be used on the premises in case plaintiff failed to pay for it. It is also obvious that plaintiff did not desist from his efforts to build the shed because the lessor had forbidden his employees proceeding with the foundation, but, when he was thereafter notified by the dealer that the lumber would not be delivered as agreed between them, he attempted through further negotiations to secure it, and manifestly gave up building the shed because he failed to make satisfactory arrangements for the purchase of the lumber. He thereafter abandoned the lease because, as he stated, he needed the shed to make profitable use of the farm. This being the cause of his abandonment, the question is: Was the lessor's conduct in that respect a breach of the lease and good ground for plaintiff to declare the agreement ended and justify him in aban-

doning the farm? 2 Wood, Landl. & T. (2d ed.) 1107. The evidence is clear that the notice given by the lessor to the lumber dealer went no further than to apprise him of the fact that plaintiff was not the owner of the premises and that the lessor would not pay for the material furnished for the improvement of the premises. This the lessor had the right to do, and the fact that the lumber dealer thereafter refused to furnish and sell to plaintiff the material under the arrangements theretofore made did not prevent plaintiff from securing the necessary material from the dealer upon other conditions or from purchasing it in the open market. Such acts on the part of the lessor do not constitute a breach of the lease or grounds for its abandonment by the lessee. Plaintiff was not thereby prevented from performing the agreements of the lease, but was left in the full enjoyment of the property. From this it results that there is no evidence tending to sustain plaintiff's claim that he was deprived of the beneficial enjoyment of the premises by the wrongful conduct of the lessor, and the court properly awarded judgment for the defendant.

By the Court.—Judgment affirmed.

JOHNSTON, by guardian *ad litem,* Respondent, vs. CHICAGO, ST. PAUL, MINNEAPOLIS & OMAHA RAILWAY COMPANY, Appellant.

January 9—January 29, 1907.

Master and servant: Assault: False imprisonment: Scope of servant's authority: Evidence: Instructions to jury: Appeal and error: Prejudicial error: Principal and agent: Delegation to a subagent.

1. In an action for assault and false imprisonment, the evidence, stated in the opinion, is *held* sufficient to show that the defendant's employee was acting within the scope of his authority.
2. In an action for assault and false imprisonment it appeared, among other things, that it was the duty of defendant's em-

ployee to look after passenger cars of its railroad; that plaintiff, with other boys, was playing on defendant's right of way, and, while a passenger train was passing, one of the boys threw a stick at and hit one of the cars; that the employee went to plaintiff's home, placed his hands on him and asked plaintiff to go to jail, whereupon plaintiff broke away and ran into the house; that the employee followed, threatening to shoot plaintiff, finally caught him, and, without a warrant or other legal process, forced and compelled plaintiff to go along divers streets to the police station, where he was confined about one hour. The court charged the jury, in effect, that, if it was the employee's duty to look after passenger cars, such authority embraced the effort to discover offenders whose prosecution was possible, and if the acts complained of were done by the employee in way of examining into the case for the purpose of discovering the offenders they were within the scope of his authority, provided he had authority to protect passenger cars. *Held* that, while such instruction was open to criticism because it in effect stated to the jury that authority to an agent to "protect and look after" his master's property rendered the master liable for acts similar to those complained of, yet it was not prejudicial to defendant in view of evidence establishing that a general agent of the defendant had authority to cause the investigation to be made through a subordinate, the employee, and that the employee acted by authority of the general agent, and in view of the further instructions that the burden was upon plaintiff to prove, by a preponderance of the evidence and to a reasonable certainty, that the employee was the agent of the defendant and acted within the scope of his authority in the matter, and that they must find that the acts complained of were done in a way of examining into the case in order to discover the offender.

3. In such case it further appeared that no limitation had been placed upon the manner of the investigation or methods to be employed in obtaining information, and that the assault and imprisonment were for the sole purpose of obtaining information sought through the investigation. *Held*, that the employee was performing his duty in his own way, and, although the methods employed were unlawful and unauthorized, they were within the scope of the employee's duty and were, therefore, the acts of the master.

APPEAL from a judgment of the superior court of Douglas county: CHARLES SMITH, Judge. *Affirmed.*

This action was brought by the plaintiff, a minor, through

his guardian against the defendant to recover for an assault and false imprisonment. The plaintiff on November 19, 1904, with some other boys was playing on or near the right of way of defendant, and while one of the passenger trains was passing one of the boys threw a stick at it, striking the trucks of one of the cars. The following afternoon one Gallagher, a watchman of the defendant, went to the home of plaintiff, placed his hand on plaintiff's shoulder, and said he wanted to talk with him; they went around in front of the house and Gallagher asked plaintiff to go to jail, whereupon the boy broke away and ran to the house. Gallagher followed, threatening to shoot him, finally caught him, and asked him if he was the boy who threw the stick at the train, which the boy denied. Gallagher afterwards took him to the house of one of the other boys who was present at the time the stick was thrown, then took him to the city hall, where he was questioned relative to throwing the stick and also in reference to stealing coal. It is claimed by plaintiff that Gallagher was acting within the scope of his authority, and therefore defendant is liable for such assault and false imprisonment. The complaint alleges, in substance, that defendant maliciously and with intent to injure plaintiff, with force and arms assaulted him, and then and there directed and caused him to be seized and laid hold of with force and violence, and then and there, without any reasonable or probable cause whatever, and without any writ, warrant, or legal process of any kind for so doing and against the will of plaintiff, unlawfully, wrongfully, and maliciously took him and forced and compelled him to go in and along divers streets in the city of Superior to the rooms occupied by the police department, and then and there against the will of plaintiff unlawfully, wrongfully, maliciously, and falsely imprisoned him for about one hour, and then and there confined him in said room and restrained him of his liberty, without any writ, warrant, or legal process, against the will of plaintiff. Defendant denied

generally the allegations of the complaint. The case was tried by the court and a jury and the jury found for the plaintiff in the sum of $250. Judgment was rendered upon the verdict, from which this appeal was taken.

For the appellant there was a brief by *Solon L. Perrin,* attorney, and *Thomas Wilson,* of counsel, and oral argument by *Mr. Wilson.*

For the respondent the cause was submitted on the brief of *Geo. E. Dietrich* and *Geo. C. Cooper.*

KERWIN, J. The errors relied upon by appellant and discussed raise the following questions: (1) Whether the night watchman, Gallagher, had authority to investigate the matter of throwing the stick at defendant's car; and (2) whether Gallagher was acting within the scope of his authority when he arrested and imprisoned the plaintiff. Whether Gallagher was acting within the scope of his duty and had authority to protect passenger cars was submitted to the jury. The jury were instructed that, if they found it was the duty of Gallagher to look after passenger cars, his authority embraced efforts to discover offenders whose prosecution was possible. It is conceded that Gallagher was employed by defendant as watchman at the Superior yard, where the alleged offense under investigation was claimed to have been committed. There is evidence that it was part of his duties to prevent property from being stolen and see that property was not damaged. The evidence also shows that the general agent, Grochau, instructed Gallagher to investigate and report on the matter of throwing at the train. It is contended, however, by appellant that Grochau had no authority to employ Gallagher to investigate, and that Gallagher's acts in that regard were not within the scope of his duty as agent of defendant. The point is made by counsel for defendant that Grochau had no authority to hire or discharge men except for the purpose of handling freight and baggage and selling tickets, and that

Gallagher was hired through authority from defendant's superintendent. It is true that the superintendent by letter instructed Grochau to employ a watchman at a fixed rate per day, but the duties of the watchman were not specifically defined by the superintendent. The fact that Grochau had no authority, without instruction from the superintendent, to hire or discharge a watchman did not interfere with his right to use such servant under his supervision for the purpose of aiding him in the performance of his duties. Aside from the fact that Grochau testified to his authority to investigate matters of injury to passenger cars and his general duties in that regard, the question of Gallagher's authority to look after the safety of the car in question was submitted to the jury, and the jury were told that if Gallagher did not have such authority plaintiff could not recover. So the authority of Gallagher to look after the safety of the car in question, we think, is established upon sufficient evidence by the verdict of the jury. It is also conclusively established by the evidence that Gallagher made the investigation under Grochau and as his subordinate. So we come to the question of the authority of Grochau to authorize such investigation. The evidence is that Grochau was general agent at Superior, and had authority to look after the safety and protection of passenger cars and to look after and investigate any damage done to them; that he had at times looked after matters of damage to property of defendant and had made investigation and reported to his superior officers; that he made investigation respecting injury to defendant's property, sometimes himself and sometimes through subordinates, and did not get special authority from his superior officers for each investigation, but had such authority as general agent, and had general supervision of the office of the company and its depot at Superior. It seems clear from the undisputed evidence that Grochau as general agent of the company had authority to cause the investigation in question to be made, and could make the investigation himself or take to his assistance the watchman, Gallagher.

The principal error complained of is the charge to the jury to the effect that, if they found it was Gallagher's duty to look after passenger cars, such authority embraced the effort to discover offenders whose prosecution was possible, and if such acts were done by Gallagher in way of examining into the case for the purpose of discovering the offenders they were within the scope of his authority, provided he had authority to protect passenger cars. This portion of the charge is severely criticised by counsel for appellant on the ground that it in effect stated to the jury that authority to an agent to "protect and look after" his master's property rendered the master liable for acts similar to those complained of in this action. The criticism is not without force. It is at least a serious question whether such authority would bring the agent within the scope of his duty in making the investigation complained of. *Mali v. Lord,* 39 N. Y. 381; *Cosgrove v. Ogden,* 49 N. Y. 255; *Allen v. L. & S. W. R. Co.* 6 Q. B. 65; *Carter v. Howe M. Co.* 51 Md. 290, 34 Am. Rep. 311; *Golden v. Newbrand,* 52 Iowa, 59, 2 N. W. 537; 3 Elliott, Railroads, § 1265; *Dolan v. Hubinger,* 109 Iowa, 408, 80 N. W. 514; *Feneran v. Singer Mfg. Co.* 47 N. Y. Supp. 284; *Pressley v. M. & G. R. Co.* 15 Fed. 199; *Baltimore & Y. T. Road v. Green,* 86 Md. 161, 37 Atl. 642; *Gilliam v. S. & N. A. R. Co.* 70 Ala. 268; *Daniel v. Atl. C. L. R. Co.* 136 N. C. 517, 48 S. E. 816, 67 L. R. A. 455; *Georgia R. & B. Co. v. Wood,* 94 Ga. 124, 47 Am. St. Rep. 146; *Singer Mfg. Co. v. Hancock,* 74 Ill. App. 556. But this portion of the charge, even if error, was not prejudicial to the defendant, since the evidence establishes that Grochau had authority to cause the investigation to be made through his subordinate, and that Gallagher acted by authority of Grochau. Besides, the court charged the jury that the burden was upon the plaintiff to prove, by a preponderance of the evidence and to reasonable certainty, that Gallagher was the agent of the defendant and acted within the scope of his authority in the matter complained of; and further, that they must find that the acts com-

plained of were done in a way of examining into the case in order to discover the offenders. If the facts established a naked authority to look after and protect property and nothing more, a very different question would be presented. But, as we have seen, the authority under which Gallagher acted was not merely to protect and look after passenger cars, but to investigate past transactions. The question, therefore, arises whether Gallagher was acting within the scope of his authority when he assaulted and imprisoned the plaintiff with a view solely of endeavoring to ascertain who committed the offense. He was acting under authority to investigate and report. Grochau testified:

"I asked him to investigate this matter of throwing sticks and report to me." "I asked him to investigate and give me all the particulars he could find out." "I sent him out to investigate it and report to me."

No limitation was placed upon the manner of investigation or methods to be employed in obtaining information, and it appears that the investigation made was for the purpose of obtaining the desired information. "Investigate" is defined: "To inquire into systematically; ascertain by careful research." Stand. Dict. 917. "To search out; to inquire into; to examine; to scrutinize." Worcester, Dict. 777. "To follow up; to pursue; to search into; to inquire and examine into with care and accuracy; to find out by careful inquisition." Webster, Dict. 713. "Investigation denotes inquiry either by observation, experiment, or discussion." *Wright v. Chicago,* 48 Ill. 285, 290. But it is contended that authority to investigate does not imply authority to do unlawful acts in the execution of such duty, and that when Gallagher unlawfully assaulted and imprisoned the plaintiff he was not within the scope of his duty. But, since he had authority to investigate and was thus engaged, his acts, though unlawful, were binding upon his master. A master is liable for the tortious act of the servant done in the scope of his employ-

ment, though the master did not sanction it, or even though he forbade it. *Phil. & R. R. Co. v. Derby,* 14 How. 468; *Bergman v. Hendrickson,* 106 Wis. 434, 82 N. W. 304.

In *Chicago C. R. Co. v. McMahon,* 103 Ill. 485, a servant was employed to collect evidence for his master in a pending litigation, and while so engaged offered a bribe to a witness, and it was held that such act was binding upon his master. The court said:

"He was empowered generally to perform that duty, without special directions. That part of the business of the company was placed in his charge, with the general authority to use his judgment in its performance. His acts, therefore, were the acts of the company within the scope of his employment. His legal authority, of course, but extended to lawful acts. So it is true of all agencies, as they are not appointed for the purpose of committing wrongs or the performance of illegal acts, except in rare cases. Few actions would be maintainable if a recovery could be had only in cases where express authority is given, or the agent is required, to commit the wrong."

The rule seems to be well settled that, where the servant is engaged in the performance of a duty delegated to him by the master, his tortious acts, within the scope of his authority, though unlawful, unauthorized, or even forbidden, are binding upon his master. *Craker v. C. & N. W. R. Co.* 36 Wis. 657; *Bergman v. Hendrickson, supra; Cobb v. Simon,* 119 Wis. 597, 97 N. W. 276; *Eichengreen v. L. & N. R. Co.* 96 Tenn. 229, 34 S. W. 219, 31 L. R. A. 702; *Evansville & T. H. R. Co. v. McKee,* 99 Ind. 519, 22 Am. & Eng. R. Cas. 366; *Chicago C. R. Co. v. McMahon, supra.* In *Bergman v. Hendrickson,* 106 Wis. 434, 436, 82 N. W. 304, this court said:

"If Backstrom committed the assault for the purpose of collecting payment for his masters' liquor, he was within the scope of his employment. It was his method of performing the duty delegated to him, and, although the method may not have been either expressly authorized or even contem-

plated,—nay, although it may have been expressly prohibited,—yet the master is liable for the damages caused thereby, provided he has intrusted to the servant the duty he was attempting to perform. *Craker v. C. & N. W. R. Co.* 36 Wis. 657; *Schaefer v. Osterbrink,* 67 Wis. 495, 30 N. W. 922; *Rogahn v. Moore Mfg. & F. Co.* 79 Wis. 573, 48 N. W. 669; *Reinke v. Bentley,* 90 Wis. 457, 63 N. W. 1055; *Bryan v. Adler,* 97 Wis. 124, 72 N. W. 368."

This language is peculiarly applicable to the case before us. Gallagher was authorized to investigate respecting a past offense. He assaulted and imprisoned the plaintiff for the sole purpose of obtaining the information sought after through the investigation. He was performing his duty in his own way, and, although the methods employed were unlawful and unauthorized, they were within the scope of his duty and were, therefore, the acts of the master.

We therefore hold that Grochau had authority to cause investigation to be made of offenses against the defendant's property, and that Gallagher was acting within the scope of his authority when he made the investigation; that the acts complained of being done in executing the master's duty, though unauthorized and unlawful, were the master's acts, for the consequences of which it is liable. It follows that the judgment of the court below must be affirmed.

By the Court.—The judgment of the court below is affirmed.

MILLER, Appellant, vs. LAVELLE, Respondent.

January 9—January 29, 1907.

Boundaries: Plats: Physical location of lot lines: Natural monuments: Courses and distances.

1. In an action of ejectment involving lots in the plat of an addition to a city no field-notes of the survey of the addition were produced. It appeared that the east and west lines of the lots, as

shown on the plat, were not closed on the south, but there appeared upon the plat a short distance south of the south ends of the east and west lines an irregular line, below which were a series of pen marks such as are commonly used by surveyors and plat makers to indicate elevation, and it also appeared from the evidence that south of the south ends of the east and west lines as indicated on the plat there was in fact an abrupt descent. *Held*, that the irregular line at the crest of the descent was the south boundary line of the lots in question, and not a line drawn between the east and west lines at points distant from the north boundary the number of feet called for by the figures marked upon the plat.

2. Where there is a natural monument or what is equivalent to a natural monument there cannot be said to be absolutely no direct evidence as to the place of physical location on the ground of the line or point in question.

3. While under the rule: In ascertaining the true location of streets, lots, and blocks according to a plat, regard is to be had (1) to the natural monuments referred to therein, and (2) to the artificial monuments placed by the surveyor to mark lines or boundaries, before resorting to the courses and distances marked in the plat or survey,—courses and distances come third in order of certainty, it is not intended to lay down a rule of law that courses and distances shall, in all cases, overcome every other species of evidence with reference to location except natural or artificial monuments.

APPEAL from a judgment of the circuit court for Chippewa county: A. J. VINJE, Circuit Judge. *Affirmed.*

The appeal is from a judgment in favor of the defendant in an action of ejectment growing out of a disputed boundary. The southern boundary of the Western addition to the city of Chippewa Falls is the common boundary between the parties. The defendant owns lots 3 and 4 of block 17 of that addition, which, by the original and recorded plats, abut on said south boundary, wherever said south boundary may be located. The case was tried by the court without a jury and the court found:

"That lots 3 and 4, block 17, of the Western addition to the city of Chippewa Falls are bounded by the intersection of the plane of the plateau with the plane of the slope of the

hill at the time of the survey and the straight lines shown on the plat produced, if necessary, to the intersection of such planes."

W. H. Stafford, for the appellant.

D. Buchanan, Jr., for the respondent.

TIMLIN, J. This location of the boundary lines of lots 3 and 4, block 17, determined the case against the plaintiff and judgment was given accordingly. It appears without substantial dispute that the platted lands embraced within said Western addition are in fact on the level of a plateau, and that to the south from about the east end of Governor street to the west line of the plat, and perhaps further, the plateau comes to an end by a somewhat abrupt descent to the flats of the Chippewa river. Some of the witnesses estimate that the angle of descent is about thirty degrees—presumably counting from the surface of the plateau extended. The contour of this descent on the surface of the plateau is such that, if a line were traced along the edge of the plateau, called by the witnesses "the brow of the hill," an irregularly curved or meander line would be produced which would cut or intersect the lines of the lots and streets of said addition, not at the distances indicated by the lengths of such lines on the plat, but beyond or south of such lengths at distances varying from eleven to twenty-four feet. The contour line of the edge of the plateau would, however, close the survey of the Western addition by an irregular boundary having a close general resemblance to the south boundary line indicated on the plat in all of its points except that of distance or length of lot lines as indicated on the plat. The plat of the Western addition shows by figures marked thereon that the length of the northwesterly line of lot 4 extending to the south boundary of the plat is only eighty-one feet, and the southeasterly line of lot 3 extending to the same boundary is only twenty-two feet. To the boundary found by the court, viz., the edge of the

plateau, the length of the former line is at the utmost 105 feet and the latter thirty-three feet. No field-notes of the survey are produced. These lots are both shown on the plat to be what are commonly known as fractional lots; that is to say, the irregular south boundary of the plat cuts the end line and the farther side line of lot 4, leaving this lot roughly triangular in shape, and cuts off the south corner of lot 3, leaving the latter in the shape of a parallelogram with one corner lopped off. The irregular line which thus closes on the south the survey of the plat in question has indicated on the plat all along that side of it toward the descent from the plateau a series of short parallel pen lines such as are commonly used by surveyors and platmakers to indicate elevation.

The appellant contends that the courses and distances marked on the plat, instead of the location of the edge of the plateau on the ground, should govern the location of the south boundary of the plat in question, and consequently the location on the ground of the boundary line in dispute between the parties. The cases of *Davis v. Rainsford,* 17 Mass. 207; *Murdock v. Chapman,* 9 Gray, 156; *Slater v. Rawson,* 1 Met. 450; *Thatcher v. Howland,* 2 Met. 41; *Parks v. Loomis,* 6 Gray, 467; 4 Lead. Cas. Real Prop. 367; *Buffalo, N. Y. & E. R. Co. v. Stigeler,* 61 N. Y. 348; *Higinbotham v. Stoddard,* 72 N. Y. 94; *White v. Luning,* 93 U. S. 514, 525; *Grier v. Pa. C. Co.* 128 Pa. St. 79, 18 Atl. 480; *Wharton v. Garvin,* 34 Pa. St. 340; *Esmond v. Tarbox,* 7 Me. 61; and *Pereles v. Gross,* 126 Wis. 122, 105 N. W. 217, are cited to the several exceptions to the rule that monuments control courses and distances in the determination of boundaries. *Pereles v. Gross,* 126 Wis. 122, 128, 105 N. W. 217, is, however, not such a case. That case on this point merely affirms that "where there is absolutely no direct evidence as to the place of physical location on the ground of the line or point in question or of any intervening point, the declaration of the plat that it is

so many feet in a given direction from the starting point must control, at least in absence of other physical facts inconsistent with such result." We think this case is not within any of the exceptions mentioned in the other cases cited by appellant. Where there is a natural monument or what is equivalent to a natural monument there cannot be said to be "absolutely no direct evidence as to the place of physical location on the ground of the line or point in question." In *Madison v. Mayers,* 97 Wis. 399, at page 411 (73 N. W. 43, 46), the following is quoted with approval:

"In ascertaining the true location of the streets, lots, and blocks in a city, according to the plat and survey thereof, regard is to be had (1) to the natural monuments referred to therein, and (2) to the artificial monuments placed by the surveyor to mark lines or boundaries, before resorting to the courses and distances marked on the plat or survey."

Thus courses and distances in this classification come third in order of certainty, but it is not intended to lay down a rule of law that courses and distances shall, in all cases, overcome every other species of evidence with reference to location except natural or artificial monuments. In *Galesville v. Parker,* 107 Wis. 363, 83 N. W. 646, it is said:

"The rules by which the lines of such plats are to be ascertained are well settled. In the absence of natural boundaries or monuments, and of monuments or stakes set in the course of the original survey, the lines of ancient fences and long-continued occupation of adjacent lots and blocks in the same plat, if evidently intended to mark the true lines of such lots and blocks, have greater probative force than mere measurements of courses and distances."

The fact that there exists on the ground south of the survey in question an abrupt descent from the plateau upon which the lots are situate, and that the contour of that descent on the upper surface would cut the lot and street lines and close the survey substantially as indicated on the plat, although at a slightly greater distance to the south as stated, and the fact

that the plat contains a picture or representation of such descent by the short parallels before mentioned, and that the line at the beginning of such descent or top of the ascent corresponding with the edge of the plateau is made to appear to close the survey of the plat on the south, and that without such plateau edge there are no data from which such irregular or meander closing line could be located between the points of contact of the street and lot lines with the southern boundary, all give the point indicated in the finding of the court the probative value of a natural monument, mentioned not in the writing, for we have not the field-notes of the survey, but by pictorial representation on the plat. Having arrived at this conclusion, it follows that the judgment must be affirmed.

By the Court.—The judgment of the circuit court is affirmed.

KLEE, Appellant, vs. STEPHENSON, Respondent.

January 9—January 29, 1907.

Guaranty: Statute of frauds: Promise to answer for debt of another: Memorandum: Consideration.

[1. Whether, under the facts stated in the opinion, notice of acceptance by plaintiff of a memorandum of guaranty was necessary in order to charge the defendant with liability as guarantor, not determined.]

2. A written instrument: "R. S. agrees to assume one-half of W. S.'s liability under the above guaranty," fails to express any consideration, and hence is void under subd. 2, sec. 2307, Stats. 1898. It is at best merely a promise to answer for the debt of another person.

APPEAL from a judgment of the superior court of Douglas county: CHARLES SMITH, Judge. *Affirmed.*

For the appellant the cause was submitted on the brief of *G. H. Winsor* and *Archibald McKay,* and for the respondent on that of *R. I. Tipton.*

WINSLOW, J. This is an action upon a written guaranty. The case was tried by the court and the facts were not in dispute. One Baillie, a merchant tailor at Superior, desired to purchase goods on credit of the plaintiff, a merchant in New York. In order to obtain credit Baillie, on the 17th day of July, 1902, procured one Sims to sign a written guaranty by the terms of which Sims, in consideration of the sum of one dollar paid by the plaintiff, guaranteed to the plaintiff payment of all indebtedness which might become due from Baillie to the plaintiff not exceeding $300 for the period of one year. At the foot of this guaranty the defendant signed an agreement in the following words:

"*Rufus Stephenson* agrees to assume one half of Wm. Sims' liability under the above guaranty. This is to be in force for one year only from above date, July 17th, 1902."

The two agreements were delivered to the plaintiff, who thereupon sold goods to Baillie during the following year upon credit, upon which a balance of more than $300 remained unpaid at the time of the commencement of this action. The defendant had no notice or knowledge that his guaranty had been accepted by the plaintiff or that any goods had been sold to Baillie relying thereon until about the time of the commencement of this action. Judgment was rendered for the defendant on the ground that his agreement was simply an offer of guaranty which had never been accepted, and the plaintiff appeals.

We express no opinion upon the somewhat vexed question whether notice of acceptance by the plaintiff was necessary to charge the defendant with liability as a guarantor. In our judgment it is certain that the written instrument fails to express any consideration, and hence is void under subd. 2, sec. 2307, Stats. 1898, because it is at best merely a promise to answer for the debt of another person. This follows necessarily from the decisions of this court. *Taylor v. Pratt,* 3 Wis. 674; *Huston v. Field,* 6 Wis. 407; *Parry v. Spikes,* 49

Wis. 384, 5 N. W. 794; *Comm. Nat. Bank v. Smith,* 107 Wis. 574, 83 N. W. 766; *Rowell v. Smith,* 123 Wis. 510, 102 N. W. 1.

By the Court.—Judgment affirmed.

PALMER, Administrator, Respondent, vs. O'ROURKE, Appellant.

January 9—January 29, 1907.

Executors and administrators: Title to personal estate: Right to assets: Possession by heir: Trover and conversion: Pleading: Complaint: Demurrer: Limitation of actions: Death of party entitled to sue: Suspension pending appointment of administrator.

1. Upon the death of any person possessed of personal estate the legal title thereto and right to possession thereof vests in his personal representative and can only reach the heirs, ultimately entitled thereto, by due course of administration.
2. In the absence of some sufficient equity in favor of an heir who has possessed himself of personalty of a decedent, the mere fact of his having an equitable interest therein as such heir does not deprive the personal representative, duly appointed to administer the estate of which such personalty forms the whole or a part, of an absolute right to recover the value thereof from such heir in case he has converted the same to his own use.
3. In an action to recover money claimed to have been converted, the complaint alleged that plaintiff's intestate instructed defendant to carry a sum of the intestate's money to a bank and deposit it in the bank to her account; that the defendant deposited it in the names of "M. O. or H. J. O.," the decedent and defendant, respectively; that defendant was an heir of decedent; and that the defendant thereafter, without authority and by falsely representing to the contrary, withdrew such deposit, part in the lifetime of decedent and part after her death. *Held,* that the complaint stated a cause of action although it showed that defendant was entitled, as heir, to receive one half the residue of the estate of decedent left after the payment of all claims allowed against the estate and the expenses of administration.

4. In such case the reasonable inference from such allegation was that the money was deposited either in the name of decedent, or in the name of defendant as the money of the decedent.
5. So construed such complaint is *held* not to show any wrongful conversion by defendant at the time the deposit was made.
6. In an action against an heir for conversion of money deposited in a bank, the complaint alleged that defendant wrongfully withdrew from the bank and converted to his own use part of the money within one year before decedent's death, and that the balance of the deposit was so withdrawn and converted six days after her death, both conversions occurring more than seven years and less than eight years before an administrator was appointed. *Held:*

   (1) As to the first withdrawal and conversion the right of the administrator to recover was barred by sec. 4222, Stats. 1898.

   (2) The limitation of sec. 4222, Stats. 1898, was not extended under sec. 4234 by the death of decedent, since the death did not occur during the last of the six years after the right of action accrued.

   (3) As to the withdrawal and conversion after the death of decedent (there being no person in existence competent to bring an action on account thereof until plaintiff was appointed administrator nearly eight years after decedent's death), the cause of action was not barred, the situation being governed by sec. 4251 (providing that there being no person in existence who is authorized to bring an action thereon at the time a cause of action accrues shall not extend the time within which, according to the provisions of ch. 177, Stats. 1898, an action can be commenced upon such cause of action to more than double the period otherwise prescribed by law).

APPEAL from an order of the circuit court for Rock county: B. F. DUNWIDDIE, Circuit Judge. *Affirmed.*

Action to recover money alleged to have been converted by defendant to his own use.

The complaint was to this effect: The plaintiff is the administrator of the estate of Mary O'Rourke and brings this action as such. October 1, 1897, she died intestate in said county of Rock, where plaintiff, December 16, 1904, was duly appointed administrator as aforesaid. October 9, 1894, there was awarded to her $1,923.30 by the county court of said county as her share of the estate of her son, of which defend-

ant was administrator, and on or about said day she received $1,500 thereof and intrusted the same to the defendant to deposit for her in the Merchants' & Mechanics' Savings Bank of Janesville, Rock county, Wisconsin. He caused the same to be deposited in said bank in the name of Mary O'Rourke, or *Henry J. O'Rourke.* The fund drew interest from the time it was so deposited, which interest was added to the principal till the whole amount was $1,634. March 27, 1897, defendant withdrew from the bank $99.87 thereof without authority by falsely representing to the contrary, and October 7, 1897, six days after the decease of Mary O'Rourke, he likewise withdrew $1,534.13, the balance of said fund. By reason of the premises, at the time of the first withdrawal he wrongfully converted to his own use $99.87, and at the time of the second withdrawal he likewise converted $1,534.13, all of which was duly demanded of him by the plaintiff before the commencement of this action and was by him refused.

The defendant demurred to the complaint for insufficiency and because the action was not commenced within the time limited by law, particularly within the time limited by secs. 4222, 4234, Stats. 1898. The demurrer was overruled.

J. J. Cunningham, for the appellant.

John Cunningham, for the respondent.

MARSHALL, J. According to the facts alleged in respondent's complaint there is no room for reasonable controversy but that the right to the property in question vested in respondent as administrator of the estate of Mary O'Rourke immediately upon his becoming such administrator. Upon the death of any person possessed of personal estate the legal title thereto and the right to possession thereof vests in his personal representative and can only reach the heirs, ultimately entitled thereto, by due course of administration. Therefore in the absence of some sufficient equity in favor of an heir who may have possessed himself of such personalty, the mere

fact of his having an equitable interest therein as such not being one, the administrator duly appointed to take charge of and administer the estate of which such personalty forms the whole or a part, has an absolute right to recover the value thereof from such heir in case of his having converted the same to his own use. That is so elementary that it need but to be stated, and is a sufficient answer to the argument of counsel for appellant that the complaint fails to state a cause of action because it shows that appellant is entitled as heir to receive one half the residue of the estate of Mary O'Rourke left after the payment of all claims allowed against the estate and the expenses of administration.

The main contention of counsel for appellant is that respondent's claim is barred by secs. 4222, 4234, Stats. 1898. As a basis for applying such sections to the pleading it is claimed that the complaint shows that appellant converted the property in question to his own use when he made the deposit in the bank October 9, 1894. The allegations on that subject are to the effect that appellant was instructed by Mary O'Rourke to deposit the money in the bank for her and that he deposited the same there in the name of "Mary O'Rourke, or *Henry J. O'Rourke,*" and that he was permitted by the bank to withdraw the deposit in two amounts by falsely representing to the officers of the bank that he was authorized to do so. The reasonable inference from such allegations is that the money was either deposited in the name of Mary O'Rourke or in the name of *Henry J. O'Rourke* as the money of the former. Unless the deposit was so made no pretense to the officers of the bank of authority from Mary O'Rourke to so draw the money would have been required. So construing the complaint in the light of such reasonable inference, as we are bound to do (*Emerson v. Nash,* 124 Wis. 369, 102 N. W. 921), it does not show any wrongful conversion by appellant at the time the deposit was made, and it is perfectly clear, we may safely say, that the pleader did not intend to charge a conversion as having occurred at that time.

It is distinctly alleged in the complaint that $99.87 of Mary O'Rourke's money was by the defendant wrongfully obtained from the bank within one year before her death and converted to his own use, and that the balance of the deposit was so obtained and converted six days after her death, both conversions occurring more than seven years and less than eight years before the administrator was appointed. As to the first of such wrongful acts the right to recover is clearly barred by sec. 4222 of the statutes pleaded. That section limits the time for the commencement of an action to recover damages for the wrongful detention of personal property to six years after the right of action has accrued. The death of the person to whom the right of action accrues does not extend such time unless such death occurs during the last of the six years. In such circumstances sec. 4234, Stats. 1898, provides that "if a person entitled to bring an action die before the expiration of the time limited for the commencement thereof and the cause of action survive an action may be commenced by his representatives after the expiration of that time and within one year from his death." *Curran v. Witter*, 68 Wis. 16, 31 N. W. 705, limited such section to cases where the death of a person occurs during the last year of his right to commence the action. So it will be seen it does not apply here.

As to the act of conversion alleged to have occurred after the death of Mary O'Rourke the sections of the statute relied on by appellant do not apply. There was no person in existence competent to bring an action on account of such conversion till the administrator was appointed in 1904. That situation is governed by sec. 4251, Stats. 1898, providing that "there being no person in existence who is authorized to bring an action thereon at the time a cause of action accrues shall not extend the time within which, according to the provisions of this chapter, an action can be commenced upon such cause of action to more than double the period otherwise prescribed by law." The complaint unmistakably shows that this action

was commenced within the double time mentioned. There being no other question that need be considered, the demurrer was properly overruled.

By the Court.—The order appealed from is affirmed.

HARDT, Respondent, vs. CHICAGO, MILWAUKEE & ST. PAUL RAILWAY COMPANY, Appellant.

January 10—January 29, 1907.

Railroads: Negligence: Personal injuries to employee: Conditions precedent: Notice of injury: Sufficiency: Evidence: Questions for jury: Findings, when disturbed: Contributory negligence: Anticipation of injury: Assumption of risk: Proximate cause: Surrounding conditions and circumstances: Appeal and error: Instructions to jury: Burden of proof: Requests for instructions: Court and jury: Deliberation of jury: Coercing verdict: Statutes: Construction: Hazards peculiar to railway employees: "Operation of railroads."

1. In an action to recover damages for an injury to the person, the matters required by sec. 4222, Stats. 1898, to be stated in the notice to be served upon the defendant within one year after the event causing the injury are: The time and place, a brief description of the injuries, the manner in which they were received and the grounds upon which claim is made, and that satisfaction is claimed of the person or corporation notified. *Held*, that a notice addressed to the defendant, declaring that plaintiff demanded satisfaction from the defendant for injuries received by him in a place described, in the performance of his duties as an employee, and that he was injured by a handcar rolling upon and over him down an embankment, is not insufficient because it failed to state, in terms, that the plaintiff claimed that the damage was caused by the defendant. The statute does not require that the notice shall so state.
2. Under sec. 4222, Stats. 1898 (providing, among other things, that the required notice shall be served "upon the person or corporation by whom it is claimed such damages were caused"), service of such notice upon the defendant corporation sufficiently informs it of the claim that the damages were caused by it.

3. Notice of an injury, claimed to have been caused by a handcar rolling upon and over plaintiff, and given under the requirements of sec. 4222, Stats. 1898, was alleged to be defective because there was no specific statement of the grounds upon which the claim was made, in that it did not, in terms, declare that the handcar was precipitated onto the plaintiff by the negligence of the defendant. In an action for such injuries it was amply proved that full disclosure and explanation were made to defendant's special agent within a few days after the accident. *Held*, that defendant could not have been misled by any such omission in the written notice, nor could any intent to mislead be presumed.
4. In an action for personal injuries to a sectionman while engaged in lifting a handcar from the track, questions as to the credibility of plaintiff's testimony as to the conduct of the foreman in lifting the handcar so as to precipitate the whole weight thereof upon the plaintiff, as to whether the action of the foreman was that customarily adopted, and as to whether plaintiff was guilty of contributory negligence, are *held* to be governed by the well-established rule that, under circumstances of mere conflict of credible testimony of witnesses, the supreme court should not and will not overrule the conclusions of the jury and the trial court.
5. In such case the method of removing the handcar described by the plaintiff, and stated in the opinion, is *held* to present no question of physical impossibility.
6. In such case, on the evidence, stated in the opinion, it is *held* that it could not be said as matter of law that plaintiff, standing in front of the handcar, as he did, to control the front end of it, was guilty of negligence where he had no reason to anticipate the result causing his injury, nor that he assumed the risk.
7. Plaintiff, who was injured while engaged in lifting a handcar from the track, the foreman lifting the rear of the car and precipitating it down and upon plaintiff, testified that, but for slipperiness, he and his companion could probably have held the car notwithstanding the conduct of the foreman. *Held*, that such testimony presented a case of an existing condition, in the face of which acts of carelessness were likely to be injurious, and that those acts should be held to be the legal cause rather than the slippery condition of the ground, which constituted merely one of the surrounding circumstances and conditions.
8. Instructions to the jury which assumed that there was evidence upon which the jury might find the facts in accordance with

plaintiff's testimony are *held* not erroneous, where the appellate court also finds that the jury might have done so.

9. It is not error to instruct the jury that the burden of proof is upon the defendant to establish contributory negligence.

10. No error can be predicated merely upon the refusal to give requested instructions where the request was an oral one and the party did not even undertake to formulate the instruction desired.

11. Where the court instructed the jury as to each question of a special verdict where an affirmative answer would be favorable to the plaintiff, that, in order to give such affirmative answer, they must be satisfied by a preponderance of the evidence, it is *held* that the instruction carried to the jury the idea that they could not decide against the defendant without being so satisfied, and to fairly cover a requested instruction that the burden of proof rested on the plaintiff.

12. A trial court has full authority, in the exercise of sound discretion, to offer aid to the jury by way of further instruction or explanation, and may, without impropriety, make inquiries of them as to whether they are likely to agree. Hence it is not error for the court, after the jury had been deliberating for some time, to recall them and ask them if they could be aided in their deliberations either by further instructions or by reading any of the evidence, or the trial judge, before leaving the courthouse for supper, to direct the officer in charge to inquire whether the jury were likely to agree within the next twenty minutes, to which they responded in the negative.

13. The phrase added to sec. 1816, Stats. 1898, by ch. 448, Laws of 1903, "provided that such injury shall arise from a risk or hazard peculiar to the operation of railroads," is hardly accurate, since injuries do not arise from hazards or risks, but from acts or events.

14. The idea intended would seem to be more clearly expressed by describing the injury or the event causing it as *within* such peculiar risk or hazard.

15. The transportation of men and materials over its tracks is part of the "operation of railroads," and none the less so because the vehicle is a handcar.

16. Plaintiff, while engaged with another sectionman and the section foreman in removing a handcar from the track, received an injury caused by the section foreman raising the rear end of the car, thereby causing it to be precipitated upon and over the plaintiff down a steep embankment. *Held* that, while the ultimate purpose of plaintiff and his fellows was to repair the roadbed, they were, at the moment of the injury, engaged in the

transportation of themselves, their handcar, tools, and materials from a station on the railway to the place of their proposed labor, and the fact that they had reached the end of their trip and were engaged in the act of alighting did not preclude the view that they were still in the course of such transportation, which could not be considered terminated until their destination was completely reached.

17. In such case the risk of injury attending the hurried removal of the handcar at an inconvenient and dangerous place is *held* to be peculiar to railroad business.

18. In such case the trial court was right in refusing to rule that plaintiff was outside the protection afforded employees of railroads by sec. 1816, Stats. 1898, as amended by ch. 448, Laws of 1903.

APPEAL from a judgment of the circuit court for Jefferson county: B. F. DUNWIDDIE, Circuit Judge. *Affirmed.*

Action for personal injuries. Plaintiff was a section hand of mature age and experience. On November 27, 1903, the section crew, consisting of foreman with plaintiff and one Davies, proceeded on handcar eastward to within about eighty feet of Rock river bridge, and stopped on a high embankment and were commanded by the foreman to take off the car. Accordingly, and in accordance with custom, plaintiff and Davies took hold of the front end, lifted the wheels off the track and swung the car around to the southward until at right angles to the track, with the rear wheels resting against the inner edge of the south rail. There is dispute as to the width of the crown of the grade at this point, but where the men stood at the front end of the car it was considerably lower than the rail, and either just over or close to the edge where the steep slope of the bank commenced. The foreman, immediately they reached this point, and without warning, lifted the rear end of the car so that the wheels would clear the track, and so that, by reason of its position, it was thrust forward, and Davies and the plaintiff were unable to hold it, partly by reason of the slipperiness of the ground, and plaintiff was thrown down and severely injured by the car. The defendant claimed

that this was the usual method of removing a handcar from a track with a crew of only three men. Plaintiff testified that the customary method in a high place like this differed in that, when the car had been brought to right angles with the track, the foreman customarily lifted one rear wheel, whereupon the car was swung further around until that wheel was over the track, and then the fourth wheel could be lifted over without peril of precipitating the car down the decline. The negligence was claimed to consist in the act of the foreman in thus suddenly lifting the rear of the car and allowing its whole weight to come upon the men at its front end. The jury found, by special verdict, (1) that the section foreman was not in the exercise of ordinary care at the time he lifted the car from the rail; (2) that such want of ordinary care was the proximate cause of the plaintiff's injury; (3) that the latter was guilty of no contributory negligence; and (4) damages. After motion to reverse the answers to the first, second, and third questions, and, failing that, that a new trial be granted, judgment was rendered in favor of the plaintiff for the amount of damages found by the jury, from which the defendant appeals.

For the appellant there were briefs by *Harlow Pease* and *H. H. Field,* attorneys, and *Charles E. Vroman,* of counsel, and oral argument by *Mr. Pease* and *Mr. Vroman.*

For the respondent there was a brief by *Kading & Kading,* attorneys, and *R. B. Kirkland,* of counsel, and oral argument by *Mr. C. A. Kading* and *Mr. Kirkland.*

DODGE, J. 1. The first assignment of error is predicated upon alleged insufficiency of the notice of injury served upon the defendant within one year after the event. That notice, addressed to the defendant, declared that plaintiff demanded satisfaction from the defendant for injuries received by him at the place described, in the performance of his duties as an employee, and that he was injured by a handcar rolling upon

and over him down the embankment. The defect, and the only defect, urged by appellant's brief in this notice is that it fails to state, in terms, that the plaintiff claimed that the damage was caused by the defendant company. A complete answer to this criticism is that the statute does not require that the notice shall so state. The matters required to be stated by sec. 4222, Stats. 1898, in the notice are: The time and place, a brief description of the injuries, the manner in which they were received and the grounds upon which claim is made, and that satisfaction is claimed of the person or corporation notified. True, the statute does require that the notice shall be served "upon the person or corporation by whom it is claimed such damages were caused." But it was so served, and obviously, in the contemplation of the statute, the service of such notice sufficiently informs the defendant of the claim that the damages were caused by it. It was suggested upon oral argument that there was no specific statement of the grounds upon which the claim was made, in that the notice does not, in terms, declare that the handcar was precipitated onto the plaintiff by negligence of the defendant. This difficulty, however, is met by the further provision of the statute that the notice shall not be insufficient or invalid because of any inaccuracy or failure in stating the grounds on which the claim is made, provided it shall appear that there was no intention on the part of the person giving the notice to mislead the other party, and that such party was not in fact misled thereby. It was amply proved that full disclosure and explanation were made to the defendant's special agent within a very few days after the accident, so that defendant could not have been misled by any such omission in the written notice, nor could any intent to mislead have been presumed. *May v. C. & N. W. R. Co.* 102 Wis. 673, 79 N. W. 31; *Collins v. Janesville,* 107 Wis. 436, 83 N. W. 695; *Garske v. Ridgeville,* 123 Wis. 503, 102 N. W. 22.

2. Great stress of argument is addressed by appellant to the proposition that the court should have directed a verdict for the defendant by reason of incredibility of plaintiff's testimony that the conduct of the foreman, in lifting both rear wheels at once clear of the rail so as to precipitate the whole weight of the car upon those standing in front, was unusual, and that there was a safer manner customarily adopted in situations like that here involved, and because it is conclusively established that the method adopted was the usual and customary one, to plaintiff's knowledge; that it was the only possible method and involved nothing of negligence on the part of the foreman; and hence that any risk therefrom was fully known to plaintiff and assumed by him, and he was guilty of contributory negligence in placing himself in a position where injury would be likely from that manner of doing the work. While, perhaps, it might be thought that there is a preponderance of evidence in favor of the customariness of this method of removing the rear end of the handcar, resulting from the testimony of two witnesses generally to that effect, and an apparent declaration to the same effect by plaintiff in examination under sec. 4096, Stats. 1898, nevertheless the plaintiff, with much particularity and under a vigorous cross-examination in the presence of the jury, testified distinctly to another method which, obviously, would lessen the danger of such an injury as the plaintiff suffered. He also, being a German with very imperfect command of the English language, explained his understanding or misunderstanding of the questions put to him in the preliminary examination. His manner, intelligence, and fairness were before the jury, as they cannot be before us, and they seem to have believed him; and the trial court, in ruling upon the motion for a new trial, has declared his opinion against the incredibility of such testimony. The rule is thoroughly well established in this state that, under such circumstances of mere conflict of credible testimony of witnesses, this court should not and will not

overrule the conclusions of the jury and the trial court. *Beyer v. St. Paul F. & M. Ins. Co.* 112 Wis. 138, 88 N. W. 57; *Bannon v. Ins. Co. of N. A.* 115 Wis. 250, 256, 91 N. W. 666; *Meyer v. Home Ins. Co.* 127 Wis. 293, 297, 106 N. W. 1087; *Peat v. C., M. & St. P. R. Co.* 128 Wis. 86, 107 N. W. 355.

But it is declared that the method of removing the car described by the plaintiff is physically impossible. We confess to utter inability to discover any physical obstacle thereto. With the car at right angles to the track and the rear wheels resting against the inner side of the south rail and the forward part of the handcar tending downward toward a declivity, whether the men holding the front end were standing over the brow of that declivity or upon the gentler slope immediately adjoining the track we can see no impossibility in the lifting first of one corner of the rear end of the car, the swinging of the forward end so as to carry that wheel over the track, and then the lifting of the remaining corner and shifting the rear end of the car sidewise the few inches necessary to carry the last wheel over the track. The adoption of such a method, instead of appearing to us incredible or even improbable, seems to us supported by the probabilities. A car resting upon its wheels and facing at right angles to the right of way is, of course, much more likely to escape from the control of the three men in charge of it and to run down the embankment than if it stand more nearly parallel to the track so that the wheels must scrape instead of turn to enable it to descend. After a most careful consideration of the contention of appellant's counsel we cannot agree that a position is presented rendering incredible the testimony of the plaintiff as to the manner in which handcars were usually removed from tracks at the top of a fill or embankment like this. If that testimony was believed by the jury there is no further difficulty in justifying their conclusion that a departure from custom by suddenly lifting the rear end and freeing the car

from the obstacle to its descent offered by the rail was conduct which a reasonably prudent man might well anticipate would cause injury to those necessarily standing at the forward end of the car, and which might, therefore, be considered negligence. Nor, in such a case, can we say, as matter of law, that one who stands in front of a handcar, as did the plaintiff, to control the front end of it, is guilty of negligence, when he has no reason to anticipate that its whole weight will be so cast downward and against him by such unusual conduct as that of which the foreman was guilty in this case. Nor, of course, can it be said, as matter of law, that he assumes the risk of that which does not usually take place, and which, therefore, he has no reason to expect.

3. A further contention closely connected with the last is that the lifting of the rear end of the car was shown by uncontradicted evidence not to have been the proximate cause of plaintiff's injury, but that the slippery condition of the ground resulting from a white frost was such. While the plaintiff states that, but for the slipperiness, he and his companion could probably have held the car notwithstanding the conduct of the foreman, yet that it was the sudden pressure against him resulting from such conduct which caused him to slip. There could hardly be a plainer case of an existing condition in face of which acts of carelessness were likely to be injurious so that those acts should be held to be the legal cause rather than the slippery condition of the ground, which constituted merely one of the surrounding circumstances and conditions. *Yess v. Chicago B. Co.* 124 Wis. 406, 102 N. W. 932; *Winchel v. Goodyear,* 126 Wis. 271, 277, 280, 105 N. W. 824; *Stefanowski v. Chain Belt Co.* 129 Wis. 484, 109 N. W. 532.

4. Several of the instructions given to the jury were excepted to, and they are assigned as error, but solely on the ground that they assumed that there was evidence upon which the jury might find the facts in accordance with plaintiff's

testimony. Since we have already concluded that they might have done so, there was no error upon that ground in giving the instructions.

Error is assigned upon an instruction that the burden of proof was upon the defendant to establish contributory negligence. It is contended that this is incorrect for the reason that it might be established by plaintiff's own evidence. The subject was so lucidly explained, and appellant's position overruled, in *Schrunk v. St. Joseph,* 120 Wis. 223, 230, 97 N. W. 946, as to render any discussion here unnecessary. The rule given by the court was correct.

Error is also assigned because the court declined to give certain instructions at the request of the defendant. As, however, the request was a mere oral one, and did not even undertake to formulate the instruction desired, no error can be predicated merely upon its refusal. *Hacker v. Heiney,* 111 Wis. 313, 87 N. W. 249; *Taylor v. Seil,* 120 Wis. 32, 97 N. W. 498; *Cupps v. State,* 120 Wis. 504, 527, 97 N. W. 210, 98 N. W. 546. Further, the matter of the request that the burden of proof rested on plaintiff was fairly covered by the instruction given. The court instructed the jury as to each of the questions where an affirmative answer would be favorable to the plaintiff that, in order to give such affirmative answer, they must be satisfied by a preponderance of the evidence, which certainly carried to the jury the idea that they could not decide against the defendant without being so satisfied. That is the burden of proof. *Bowe v. Gage,* 127 Wis. 245, 251, 106 N. W. 1074; *Anderson v. Chicago B. Co.* 127 Wis. 273, 280, 106 N. W. 1077.

We find nothing of error nor reason to believe any prejudice to the defendant, in the fact that the court, after the jury had been deliberating for some time, recalled them and asked them if they could be aided in their deliberations either by further instructions or by the reading of any of the evidence, or that, before leaving the courthouse for supper, he directed

the officer in charge to inquire whether the jury were likely to agree within the next twenty minutes, to which they responded in the negative. The court has full authority in the exercise of sound discretion to offer aid to the jury by way of further instruction or explanation, and he certainly can, without impropriety, make such an inquiry of them as was done in this case. In such acts there is by no means necessarily any implication of criticism, as suggested by appellant's counsel, nor of urgency calculated to divert the jury from that deliberation which they may think necessary to the solution of the questions submitted to them. *Douglass v. State,* 4 Wis. 387, 393; *Odette v. State,* 90 Wis. 258, 62 N. W. 1054; *Secor v. State,* 118 Wis. 621, 95 N. W. 942.

5. Perhaps the most important question presented—raised by demurrer *ore tenus*—is whether the plaintiff's case falls within the exception to the common-law fellow-servant doctrine declared by sec. 1816, Stats. 1898, as amended by ch. 448, Laws of 1903, "provided such injury shall arise from a risk or hazard peculiar to the operation of railroads." This phrase is apparently new in legislation. It is hardly accurate, since injuries do not arise from hazards or risks, but from acts or events. Perhaps the idea would be more clearly expressed by describing the injury or the event causing it as *within* such peculiar risks or hazards. However, we think the general meaning of the phrase reasonably clear. Before the passage of the act of 1903 there had been much debated both the constitutionality and the justice of placing employees of railroads upon different footing from other workmen not distinguishable from them either by the character of their employment or the perils of injury surrounding it. It was argued that it was neither just nor proper to distinguish one riveting a boiler in a shop belonging to a railroad company from one engaged in similar work in the shop of a manufacturer of threshing machines or steam dredges; or one felling timber for a railway company on its right of way from those

performing like work on adjoining land for a private owner. The supreme court of Minnesota, in *Lavallee v. St. P., M. & M. R. Co.* 40 Minn. 249, 41 N. W. 974, had declared the unconstitutionality of such discrimination. In that case, however, it was recognized that some employees of railroads are "exposed to peculiar hazards attending that business" of operating railroads legitimately distinguishing them from workmen in other employments. Some of those peculiarities were attempted to be described by the writer in his dissenting opinion in *Medberry v. C., M. & St. P. R. Co.* 106 Wis. 191, 81 N. W. 659. Accordingly, the Minnesota court imported into their statute, by construction, a limitation to employees exposed to such peculiar hazards and whose injuries resulted from acts or events within such risks. In Iowa we find a statute exempting injured employees from the fellow-servant doctrine when their injuries result from wrongs of co-employees "in any manner connected with the use and operation of the railway." It will be noticed that in both these statutes, after the judicial qualification in Minnesota, the expression "operation of the railroad" occurs as in our own, and, accordingly, their decisions are cited to us as persuasive as to the meaning of that phrase; it being contended that the removal of this handcar by the sectionmen could not fall within "operation" of the railroad. In Iowa the weight of decision is against the view that mere repair of roadbed or track is operation. *Dunn v. C., R. I. & P. R. Co.* (Iowa) 107 N. W. 616. In Minnesota, apparently a contrary view prevails. *Nichols v. C., M. & St. P. R. Co.* 60 Minn. 319, 62 N. W. 386; *Blomquist v. G. N. R. Co.* 65 Minn. 69, 67 N. W. 804. In apparent concurrence with which are *Callahan v. St. L. M. B. T. R. Co.* 170 Mo. 473, 71 S. W. 208; *Stubbs v. O., K. C. & E. R. Co.* 85 Mo. App. 192, and *Chicago, K. & W. R. Co. v. Pontius,* 157 U. S. 209, 15 Sup. Ct. 585. What we should conclude as between such conflicting views may well be left until some concrete case requires us to decide. The present

one does not involve it, for, while the ultimate purpose of plaintiff and his fellows was to repair the roadbed, they were, at the moment of injury, engaged in the transportation of themselves, their handcar, tools, and materials from a station on the railway to the place of their proposed labor. The fact that they had reached the end of their trip and were in the act of alighting does not preclude the view that they were still in course of such transportation, which could not be considered terminated until destination was completely reached. The removal of the handcar, tools, and materials to their intended place beside the track was clearly part of their transportation. The protection accorded one "riding on an engine" extends to him while in the act of alighting. *Gaffney v. C., M. & St. P. R. Co.* 127 Wis. 113, 120, 106 N. W. 810. We can entertain no doubt that the transportation of men and materials over its tracks is part of the operation of a railroad; and none the less so because the vehicle is a handcar. Such view seems to have the sanction of all decided cases speaking directly on the subject. *Frandsen v. C., R. I. & P. R. Co.* 36 Iowa, 372; *Larson v. Ill. Cent. R. Co.* 91 Iowa, 81, 58 N. W. 1076; *Thompson v. Chappell,* 91 Mo. App. 297; *Chicago, M. & St. P. R. Co. v. Artery,* 137 U. S. 507, 11 Sup. Ct. 129; *Tex. & P. R. Co. v. Hervey* (Tex. Civ. App.) 89 S. W. 1095; *Houston & T. C. R. Co. v. Jennings,* 36 Tex. Civ. App. 375, 81 S. W. 822. It also seems plain that the risk of injury attending the hurried removal of the handcar, at such an inconvenient and dangerous place as the crest of a steep incline, was peculiar to the railroad business. The likelihood of passing trains rendered such act imperative whatever the difficulties or dangers, as it would not ordinarily be in any other employment or business. We conclude the trial court was right in refusing to rule that plaintiff was outside the protection afforded employees of railroads by sec. 1816, Stats. 1898, as amended.

By the Court.—Judgment affirmed.

PARKER, Respondent, vs. FAIRBANKS-MORSE MANUFACTURING COMPANY, Appellant.

January 10—January 29, 1907.

Master and servant: Negligence: Personal injuries: Reasonably safe place to work: Instructions to jury: Appeal and error: Immaterial error: Contributory negligence: Assumption of risk: Excessive damages: Remarks of counsel.

1. **While the rule as to a master's measure of duty in furnishing a servant a reasonably safe place to perform his duties, *i. e.* that the master use ordinary care in furnishing a reasonably safe place, and that such duty is absolute and not dependent on the degree of care exercised by the master in performing it, is unquestionably correct, submission to the jury of instructions as to the measure of the master's duty is required only when there is credible evidence in the case that would justify the jury in drawing the inference that the master, when an accident occurred, either had or had not performed his duty to the servant of furnishing him such reasonably safe place.**
2. **In such case if the evidence permits of no other inference than that the master failed in this duty to the servant, it devolves upon the court to determine that question as matter of law, leaving nothing for the jury to pass upon in respect to it.**
3. **Under such a state of the evidence, submission of the issue to the jury under erroneous instructions is immaterial error.**
4. **When, in an action by a servant for injuries sustained from the collapse of a defective scaffolding erected by the master, no other inference can be drawn than that the master did not furnish the servant a reasonably safe place to work, it is *held* that it was the duty of the court to declare, as matter of law, that the master was guilty of negligence.**
5. **In an action by a servant for injuries sustained from the collapse of a defective scaffold erected by the master, it appeared, among other things, that the servant did not observe or know how the scaffold was erected or supported, although he was working on the wall near it, and that he assumed that it was properly constructed and reasonably safe. *Held*, under the facts and circumstances, stated in the opinion, that there were no grounds in the evidence for the contention that the servant was guilty of contributory negligence, or that, as matter of law, he assumed the risk of the danger incident to the collapse of the structure.**

6. The use of the word "fair" in a phrase of the instructions to the jury: "The burden of proof is upon the plaintiff to satisfy you by a fair preponderance of the evidence," in connection with a direction that the jury must be satisfied of the existence of the fact referred to, is not misleading and therefore not prejudicial.
7. A servant, sixty-four years of age, was injured by the fall of a scaffold. His right leg was crushed, his left arm broken near the wrist, his right arm dislocated, his left leg and knee injured, the bones of his nose broken, and the larger part of his upper lip cut through. His right leg had to be amputated at the junction of the upper with the middle third of the femur. During a period of several months in the hospital he suffered much pain and troublesome sores developed. After leaving the hospital he was delirious at times as the result of his pain and suffering and he suffered much from sleeplessness. His condition up to the time of the trial necessitated much care and nursing, and it appeared that he would require such assistance for an indefinite period. It was uncertain whether he would be able to make use of an artificial limb and to what extent he would be able to employ artificial aids to locomotion. Before the accident his health had been apparently good, and he had always been active as a laborer and contractor, but had practically become disabled from pursuing his occupation. His earnings had averaged from $1,200 to $1,500 a year. *Held*, that a verdict of $13,500 was not excessive.
8. Where the court had instructed the jury that remarks of counsel, to which exception was taken, must be disregarded in their determination of the questions submitted, it is *held* that no prejudicial effect could have resulted from such remarks of counsel.

APPEAL from a judgment of the circuit court for Rock county: B. F. DUNWIDDIE, Circuit Judge. *Affirmed.*

Action for personal injuries. It appears that the defendant is a corporation engaged in the manufacture of machinery and engines in the city of Beloit, Wisconsin, owning and maintaining buildings used as mills and shops. At the time of this accident it was engaged in erecting a second-story addition to a shop building. The old one was a one-story brick structure, with hip roof in sections running east and west across the building, which was longest north and south. The

improvement consisted of a second-story brick structure, to be built on top of the walls of the original structure. The plaintiff was engaged as a bricklayer on the walls of this new part of the structure. The accident happened on October 10, 1904. At the time of this accident the walls of the addition to the shop had been built to, and in part above, what is called scaffold height. Plaintiff was engaged at the southwest corner of the addition in laying the outside brick wall, which was somewhat higher than the rest of the south east-and-west wall. He was working on a scaffolding inside of the wall along the west end of the structure. In performing his duty it was necessary to use the leadline for laying the bricks on the outside of the walls. This line was placed over and around the corner and attached to a pin fastened in the outside of the south wall. When the wall had been built to a height so he could not reach from where he stood on the inside scaffolding to change the pin and leadline, it was necessary for him to go onto the scaffolding outside of the south wall to adjust the line. Some days before the accident the defendant's mason foreman had notified the carpenter foreman engaged on this building that the scaffolding on the outside south wall would be needed to proceed with the erection of the building. On Friday and Saturday preceding the Monday when the accident happened, carpenters under the direction of the carpenter foreman built this outside scaffolding, except the west end of it, which was completed early in the forenoon of Monday and shortly before the accident. It was placed on the roof of the old structure, immediately south of the wall of the new addition. It consisted of uprights and standards, with ledger boards, footlocks [putlocks], and planks for the covering or floor on which the workmen were to stand and building material was to be placed. Soon after the carpenters had completed it, the plaintiff, while engaged in laying the southwest corner of these walls, as above stated, stepped from the inside scaffolding over the south wall onto this outside scaffolding to adjust the lead-

line at this corner, and then returned to his work on the inside scaffolding. In the course of about ten or fifteen minutes the leadline required resetting, and he again stepped over the south wall onto this outside scaffolding to perform this duty. While so engaged near the southwest corner the scaffolding collapsed and fell, throwing him violently to the ground among the planks and other material of the scaffolding, causing him serious personal injuries.

It appears that no other weight than that of the plaintiff was on this scaffolding at the time it fell. He had used it in the usual and ordinary way and for the purpose for which it was designed. It is claimed that the scaffolding was defectively constructed and not reasonably safe; that defendant was guilty of negligence in not performing its duty in this respect. Allegations of specific negligence were that the scaffolding was insufficient and unsafe by reason of defendant's omission to place the footlock nearest the southwest corner of the building into a footlock hole of the south wall (footlocks are pieces of lumber extending from the ledger boards to the wall, upon which the floor of the scaffolding rests, and footlock holes are openings in the walls into which the footlocks are placed to hold them in place); that the westerly footlock was too far removed from the corner of the building and insecurely placed and supported by too short a standard, and that this was in turn supported at its foot by two or three bricks under it; that this footlock was not securely nailed to the standard; and that the scaffolding floor was composed of short planks so placed and projected over the last footlock as to render the structure insufficient and not reasonably safe for its purposes. The plaintiff's injuries were serious and caused him much pain. The evidence tends to show that he suffered the following injuries: The right leg was crushed, a break near the left wrist, dislocation of the right arm, injury to his left leg and knee, a break of the bones of the nose, and a cutting through the larger part of his upper lip. His right leg had

to be amputated at the junction of the upper with the middle third of the femur. During the period of several months in the hospital plaintiff suffered much pain and troublesome sores developed. After leaving the hospital in January following the accident he was delirious at times as the result of his pain and suffering and suffered much from sleeplessness. His condition up to the time of the trial has necessitated much care and nursing, and he will require such assistance for an indefinite period. It is uncertain whether he will be able to make use of an artificial limb and to what extent he will be able to employ artificial aids to locomotion. Before the accident plaintiff's health was apparently good. He had always been active as a laborer and contractor. His earnings from his business ranged from $1,200 to $1,500 a year. At the time of the injury he was sixty-four years of age. The jury found by general verdict for the plaintiff, and assessed his damages at $13,500, for which sum and costs judgment was awarded him. This is an appeal from such judgment.

For the appellant there was a brief by *Vilas, Vilas & Freeman,* attorneys, and *E. M. Ashcraft,* of counsel, and oral argument by *E. P. Vilas.*

For the respondent there was a brief by *Fethers, Jeffris & Mouat,* and oral argument by *M. G. Jeffris* and *M. O. Mouat.*

SIEBECKER, J. Appellant urges an exception to the court's instruction pertaining to appellant's duty of furnishing respondent a reasonably safe place to perform his duties as a servant. The instruction is criticised as not submitting to the jury appellant's measure of duty in this respect by informing the jury "that it is the duty of [appellant] to use ordinary care in constructing a reasonably safe place," and in omitting to direct them that such duty is an absolute one and is not dependent on the degree of care exercised by the master in performing it. The rule contended for is unquestionably

correct. *Howard v. Beldenville L. Co.* 129 Wis. 98, 108 N. W. 48. Whether the court prejudicially erred in the instruction given need not be considered in view of our conclusion in the case. The instruction complained of attempted to inform the jury of the defendant's duty as to furnishing a reasonably safe place for plaintiff to perform his duties as defendant's servant, and they were to determine from the evidence adduced whether defendant had failed, as charged in the complaint, to perform this duty to plaintiff. Submission of this inquiry to the jury is required only if there be credible evidence in the case that would justify the jury in drawing the inference that defendant, when the accident occurred, either had or had not performed its duty to plaintiff of furnishing him a reasonably safe place to do his work. If the evidence permits of no other inference than that defendant failed in this duty to plaintiff, it devolved on the court to determine that question as matter of law, leaving nothing for the jury to pass upon in respect to it. Under such a state of the evidence, submission of the issue to the jury under erroneous instructions is immaterial error, because it did not affect the rights of the parties arising from such undisputed state of the evidence. We are persuaded that there can be but one inference from all the credible evidence before us respecting defendant's neglect to furnish plaintiff a reasonably safe place to work. The facts and circumstances bearing on this question all point one way, namely, that the scaffolding was so defectively constructed that it was not a reasonably safe place for plaintiff to perform the duties assigned him. From the foregoing statement of facts it appears that defendant furnished this scaffolding for plaintiff's use in building the walls of the new structure, and that the weight of his body alone caused it immediately to collapse. There is nothing to show but that he used it in a proper and ordinary way; nothing was done nor did anything take place which should cause it to collapse aside from the fact that it was not sufficiently strong to

support plaintiff. The physical facts surrounding the accident are clear and undisputed, and clearly tend to show that the falling of the structure must have resulted from some defect in its construction. From these facts no other inference can be drawn than that the defendant did not furnish plaintiff a reasonably safe place to work. *Spaulding v. C. & N. W. R. Co.* 33 Wis. 582; *Cummings v. Nat. F. Co.* 60 Wis. 603, 18 N. W. 742, 20 N. W. 665; *Carroll v. C., B. & N. R. Co.* 99 Wis. 399, 75 N. W. 176. This situation called upon the court to declare, as matter of law, that defendant was guilty of negligence as charged by the plaintiff, and it left nothing for submission to the jury as to this issue of the case. The jury having no question of fact to ascertain upon this issue, it becomes immaterial what instructions were actually submitted respecting it, since the verdict is in harmony with the fact.

It is urged that the plaintiff was guilty of a want of ordinary care in using the scaffolding. The argument is made that he knew, or in the exercise of ordinary care ought to have known, that no footlock hole had been left for the support of the westerly footlock, and that this fact imposed on him the duty to examine the structure as to its sufficiency and safety before going onto it, and that, having failed to do so, he assumed the risk incident to its use as constructed. The evidence is uncontradicted that plaintiff did not in fact observe or know how the footlocks were placed or supported. The claim that, since he was working on the wall near the scaffolding, he could not avoid observing that there was no footlock hole for the support of the westerly footlock, and that he therefore, in the exercise of ordinary care, was required to inform himself how it was in fact supported, and that such inspection would have disclosed to him any defects in the construction of the structure, is not sustained. The evidence does not clearly disclose that he was informed that no footlock hole had been provided for the support of the westerly footlock, nor

does the evidence clearly support the inference that he observed how the carpenters supported it, nor does it appear that he was otherwise informed how the carpenters supported or constructed any part of it. The evidence tends to show that he assumed that it was properly constructed and reasonably safe. Under the facts and circumstances we discover no grounds in the evidence for the contention that plaintiff was guilty of contributory negligence as matter of law in the respects claimed, or that he assumed the risk of the danger incident to the collapse of the structure. The question was properly submitted to the jury for determination.

An exception is urged to the use of the word "fair" in the phrase of the instruction: "The burden of proof is upon the plaintiff to satisfy you by a fair preponderance of the evidence." As held in *McKeon v. C., M. & St. P. R. Co.* 94 Wis. 477, 487, 69 N. W. 175, the use of the word "fair" in such connection, with a direction to the jury that they must be satisfied of the existence of the fact referred to, is not misleading and therefore not prejudicial. *Curran v. A. H. Stange Co.* 98 Wis. 598, 74 N. W. 377.

It is contended that, in view of plaintiff's injuries, his age, and his previous earning capacity, the amount of damages awarded is excessive, and that it shows that the jury were improperly influenced by passion and prejudice in determining this question. The extent of his injuries has been set out in the foregoing statement of facts. That they were accompanied by severe pain and suffering is without question. It is apparent to a reasonable certainty that his injuries will cause him pain and suffering in the future, that he will require extra personal care and attention on account of them, and that he is practically disabled from pursuing his occupation. These elements of injury, the actual loss of his leg, the injured condition of the other leg and arm, and the resultant nervous condition persuade us that it cannot be said that the damages allowed are so large as to warrant the court in hold-

ing that the jury improperly allowed them. The verdict must stand.

We have examined the exceptions taken to the remarks of counsel, and find that the court instructed the jury properly to the effect that the remarks so excepted to must be disregarded by them in their determination of the questions submitted. Under the circumstances we are of opinion that no prejudicial effect could have resulted from them.

No prejudicial error is discoverable in the record.

By the Court.—Judgment affirmed.

CHANT, Respondent, vs. CLINTON TELEPHONE COMPANY, Appellant.

January 10—January 29, 1907.

Telephones: Construction of lines: Use of highways: Negligence: Contributory negligence: Statutes: Construction.

1. Ch. 505, Laws of 1905 (sec. 1778, Stats. 1898, as amended), authorizes the construction and maintenance, upon certain terms and conditions, of telephone lines upon public highways, but provides that no such telephone line or any appurtenance thereto "shall at any time obstruct or incommode the public use of any road, highway, bridge, stream or body of water;" and sec. 1329*a* provides that all wires strung on poles shall be not less than twenty-four feet above the ground at all crossings, and not less than fourteen feet above the ground at all other places. Plaintiff was moving his threshing machine drawn by a traction engine along a highway, the grain elevator thereof extending fourteen and one-half feet above the surface of the traveled track, when it came in contact with, and was injured by, a guy wire maintained by defendant telephone company which was originally fifteen feet and six inches at one end and sixteen feet at the other above the surface of the traveled track, but which had sagged so that it was only about thirteen feet above such track. There was evidence that plaintiff did not know that the guy wire would strike the elevator

of the threshing machine, that he was guiding his engine and giving it attention in order to keep it in the traveled track and out of the ditch, that there was a strong wind blowing the smoke into his face, and that he did not see the wire. *Held:*

(1) Defendant was guilty of negligence.

(2) It could not be said as matter of law that plaintiff was guilty of contributory negligence.

2. In such case it could not be said that the damages were caused by the engine being used in drawing the threshing machine, nor that the engine contributed to the injury complained of, and hence sec. 1347*b*, Stats. 1898 (which, in enumerated cases, makes the owner of any steam engine liable for damages that may be caused by propelling such engine along a highway), had no application to the case presented.

APPEAL from a judgment of the circuit court for Rock county: B. F. DUNWIDDIE, Circuit Judge. *Affirmed.*

This action was brought to recover damages alleged to have been caused by the improper construction and maintenance of a guy wire extending across a public highway. The action was commenced in justice's court, and on appeal tried in the circuit court. The complaint alleges, in effect, the corporate existence of the defendant; that on or before the 8th day of September, 1905, it had wrongfully and negligently erected, kept, and maintained a strong wire, contrary to the laws of the state of Wisconsin, running across the Beloit and Milwaukee highway, in the town of Turtle, Rock county, Wisconsin; that such wire came in contact with the grain elevator of the plaintiff's threshing machine, broke and demolished the same, and rendered it useless, in consequence of which plaintiff sustained damages in the sum of $142. The defendant answered denying the allegations of the complaint, and also setting up a counterclaim alleging damages for destroying its guy wire and post to which the same was attached in the sum of $10. Upon trial in circuit court a verdict was found in favor of the plaintiff for $74.80. Defendant moved for a new trial on the grounds (1) that the verdict was contrary to law and (2) contrary to the evidence, which motion was de-

nied and judgment rendered in favor of the plaintiff on the verdict, from which this appeal was taken.

For the appellant there was a brief by *Whitehead & Matheson,* and oral argument by *J. M. Whitehead.*

For the respondent there was a brief by *Pierce & Fisher,* and oral argument by *C. E. Pierce.*

KERWIN, J. The only questions for consideration upon this appeal are (1) negligence of the defendant, and (2) contributory negligence of the plaintiff. The defendant for about two years prior to the time of the injury complained of had been maintaining a telephone line upon a public highway described in the complaint, and had strung one of its guy wires across such highway at a distance of about fifteen feet six inches at one end and sixteen feet at the other above the surface of the traveled track. When the injury occurred plaintiff was moving his threshing machine drawn by a traction engine along such highway, and in passing under the defendant's guy wire, while in the middle of the highway and upon the traveled track, the grain elevator of his threshing machine came in contact with said guy wire and was damaged.

1. It is contended on the part of the appellant that there is not sufficient evidence to warrant the jury in finding that defendant was guilty of negligence. Sec. 1778, Stats. 1898, as amended (ch. 505, Laws of 1905), authorizes the construction and maintenance, upon certain terms and conditions, of telephone lines upon public highways, but provides that no such telephone line or any appurtenance thereto "shall at any time obstruct or incommode the public use of any road, highway, bridge, stream or body of water;" and sec. 1329*a* provides that all wires strung upon poles shall be not less than twenty-four feet above the ground at all crossings, and not less than fourteen feet above the ground at all other places. There can be no doubt that the defendant was bound to construct and maintain its wires so as not to incommode the pub-

lic use of the highway in question. *Wilson v. Great S. T. & T. Co.* 41 La. Ann. 1041, 6 South. 781; *Dickey v. Maine T. Co.* 46 Me. 483. There is evidence tending to show that this wire during the spring and summer immediately preceding the injury had been swinging loose and was considerably sagged, so that it was only thirteen feet above the surface of the traveled track; that a person traveling on the highway upon a load of hay would have to stoop down and raise the wire up in order to pass under it; that it began to sag soon after it was put up, and kept on getting worse up to the time of the injury; that the plaintiff's grain elevator extended about fourteen and one-half feet above the surface of the traveled track, and that it was customary to draw such machines upon the highway in going from one job to another; that the wire struck the elevator about thirteen feet above the surface of the highway, causing the damage complained of.

2. It is contended, however, upon the part of appellant that the plaintiff was guilty of contributory negligence because the wire had been maintained upon the highway for upwards of two years with the knowledge of plaintiff, and, further, that he should have taken his grain elevator down while going from one job to another. It cannot be said as a matter of law upon the evidence produced that it was negligence to move a machine along the highway in question with elevator in such position, since, had the wire been properly constructed and maintained, it would not have come in contact with the elevator. There is evidence tending to show that plaintiff did not know that the wire was so maintained as to strike the elevator of his machine, and, besides, he was guiding his engine and giving it attention in order to keep it upon the traveled track and out of the ditch; that there was a strong wind blowing the smoke in his face, and he did not see the wire. If plaintiff did not know that the wire had sagged so as to be in a position to strike the elevator, or if his attention was diverted in managing his engine, so that he did not remember

the defect and was not guilty of want of ordinary care in not remembering, he was not guilty of contributory negligence. *Cuthbert v. Appleton,* 24 Wis. 383; *Crites v. New Richmond,* 98 Wis. 55, 73 N. W. 322; *Collins v. Janesville,* 111 Wis. 348, 87 N. W. 241, 1087; *Collins v. Janesville,* 117 Wis. 415, 94 N. W. 309; *Coppins v. Jefferson,* 126 Wis. 578, 105 N. W. 1078.

We are also cited to sec. 1347*b,* Stats. 1898, which makes the owner of any steam engine liable for damages that may be caused by propelling such engine along a highway. But we are clear that the statute referred to has no application to the case before us. No damage was caused by the engine being used in drawing the machine, nor did it in any way contribute to the injury complained of. The issues raised by the pleadings were submitted to the jury, and they found in favor of the plaintiff and assessed his damages at $74.80. We think the verdict is well supported by the evidence, and therefore the judgment must be affirmed.

By the Court.—The judgment of the court below is affirmed.

SPAFFORD, Respondent, vs. MCNALLY and wife, Appellants.

January 11—January 29, 1907

Mechanics' liens: Right of trial by jury: Appeal and error: Review: Harmless error: Damages: Modification of judgment on appeal: Costs.

1. Under sec. 3323, R. S. 1878, any issue of fact in an action to enforce a mechanic's lien was, on demand of either party, triable by a jury, whose verdict was thereby made conclusive as in other cases. This section was amended by ch. 80, Laws of 1897 (sec. 3323, Stats. 1898), so that at present such actions are deemed equitable and any issue of fact therein may be referred by the court as in other cases. *Held,* that by such amendment the right to trial by jury on demand, and the effect of their ver-

dict, were eliminated, and hence, in such an action, the improper admission of evidence is not necessarily ground for reversal.

2. Where a mechanic is prevented from completing his contract by acts of the owner, he is entitled to recover the contract price less whatever it would have cost to have completed the work when he was stopped.

3. Where the appellant has made no attempt in the court below to correct a small error in computation of the damages awarded on a breach of a contract to perform designated work at stipulated prices, on reversal the error is regarded as having been waived, and is not allowed to affect the question of costs in the appellate court.

APPEAL from a judgment of the circuit court for Rock county: B. F. DUNWIDDIE, Circuit Judge. *Modified and affirmed.*

This action was commenced January 18, 1905. The complaint alleges, in effect, that the action is to foreclose a mechanic's lien for services rendered by the plaintiff as a mason in the erection and construction of a dwelling house for defendant on the land described under a contract made and entered into by and between the plaintiff and defendant a short time prior to August 10, 1904, wherein and whereby plaintiff was to do all the mason work, lay the cellar walls, build and erect two chimneys, and do all the plastering therein, for which the defendant was to pay the plaintiff for the highest chimney thirty-five cents per foot and thirty cents per foot for the lowest chimney, and eleven cents per square yard for putting on two brown coats and a hard finish coat of plastering on the walls of the dwelling; that in pursuance of such agreement the plaintiff erected and constructed the cellar walls and the defendant paid him in full therefor; that he built two chimneys, one of which was twenty-four feet high and the other twelve feet high, and that he employed a man to help and assist him in doing the work; that the plaintiff put two coats of brown plastering on the walls of such dwelling house and prepared the plaster for a coat of hard finish and left said walls so as to enable him to put the coat of hard

finish thereon; that October 27, 1904, the plaintiff and his helper so employed were at said dwelling house for the purpose of putting said hard-finish coat of mortar and offered and proposed to complete said work as agreed, but the defendant wholly refused to allow him to do so or to remain on the premises; that the value of the services of himself and helper in the erection and construction of the highest chimney was $8.40 and of the lowest chimney $3.60; that in plastering the walls plaintiff put on about 1,000 yards of plastering, and the value of such services in putting the same on was $100; that in the completion of said contract plaintiff slacked and prepared the lime for the coat of hard finish; that he paid his helper and assistant for so preparing the said hard-finish coat $5, and for his time in going to said dwelling house October 27, 1904, $2; that his own time in going there on that day was of the value of $3.50; that the labor performed by himself and his assistant in the construction of the chimneys and plastering the walls was of the value of $122.50; that there was a balance due the plaintiff of $75.70, which the defendant has wholly refused to pay and refuses to perform his said agreement; that after the defendant so refused to allow plaintiff to put on said hard-finish coat of plaster the defendant and his wife accepted, occupied, and used said dwelling house and have continued to do so; that the plaintiff began said work prior to August 10, 1904, and performed the last of said work October 27, 1904; that the plaintiff's claim for a lien was filed November 7, 1904.

The answer expressly admits the making of the agreement as alleged, that the plaintiff built the cellar walls, and that the defendant had paid him therefor as alleged; also admits that the plaintiff built two chimneys as alleged; also admits that he put on the first two coats of plastering as alleged; and also admits that the claim for a lien was filed as alleged. The answer alleges that said contract was an entire contract, and that the plaintiff had neglected and refused to perform and complete the same by refusing and neglecting to put on the

hard-finish coat of plaster, and that the defendant was obliged to employ another person to complete and finish the work. Otherwise the answer consists of specific denials.

At the close of the trial the court found as matters of fact, in effect, that the allegations of the complaint were proven and true, and reiterates the same; and further, specifically found that after the plaintiff had prepared the plaster for said third coat of hard finish and had gone with his helper to said dwelling house for the purpose of completing such work, he was ready and willing and offered and proposed to proceed and finish said plastering as required by and in pursuance of said contract, and defendant, without cause, wholly refused to allow the plaintiff to complete said work and forbade him from finishing said plastering and requested him to leave the premises, and in pursuance of such request the plaintiff did leave such premises; that the defendant paid to plaintiff's helper to apply on such services $29, and wholly refused to pay to the plaintiff any other or further sum for said work; that the plaintiff spent fifteen and one-half days in building the chimneys and putting on the plaster and the same was reasonably worth $3.50 per day, making $54.25; that said helper spent in doing said work fifteen days and the same was reasonably worth $2.25 per day, making $34.75, making for the services of the plaintiff and his helper $89. Deducting therefrom the $29 paid to the helper left a balance of $60. As conclusions of law the court found that the plaintiff was entitled to judgment for said sum of $60, with costs and disbursements. From the judgment so entered both the defendants appeal.

J. J. Cunningham, for the appellants.

A. A. Jackson, for the respondent.

CASSODAY, C. J. The right to a mechanic's lien on real estate is given by the statutes (ch. 143, R. S. 1878 and Stats. 1898). By the Revision of 1878 any issue of fact in

such an action was, "on demand of either party," triable "by a jury, whose verdict thereon" was thereby made "conclusive as in other cases." Sec. 3323, R. S. 1878. In the case at bar the defendant insists that he was entitled to a jury trial. In making such contention counsel seem to have overlooked the amendment whereby that section of the statutes is made to declare that "such actions shall be deemed equitable and any issue of fact therein may be referred by the court as in other cases." Ch. 80, Laws of 1897, and sec. 3323, Stats. 1898. Even prior to that amendment such actions were held to be "suits in equity, with the added feature" in respect to a jury trial and the effect of a verdict. *Charles Baumbach Co. v. Laube,* 99 Wis. 171, 176, 74 N. W. 96; *Siebrecht v. Hogan,* 99 Wis. 437, 440, 441, 75 N. W. 71. By the amendment mentioned the right to a jury trial on demand, and the effect of a verdict therein, were eliminated. This action, being equitable in its nature, was, by virtue of the amendment mentioned, triable by the court without a jury. Being triable by the court without a jury, reversible error cannot be predicated upon the improper admission of testimony. As indicated in the statement of facts, the answer expressly admits, as alleged in the complaint, the making of the agreement upon which the action is based, the building of the two chimneys, and the putting on of the first two coats of plaster. In fact, the answer substantially admits that the plaintiff fully performed such contract on his part, except he had not put on the third coat of hard-finish plaster. If it be claimed that such full performance is not so admitted, still it is certainly so found by the court, and there is plenty of evidence to support such findings. The answer alleges the failure to put on the third coat of hard-finish plaster as a breach of contract on the part of the plaintiff. To the contrary the complaint alleges, and the court found in effect, that the plaintiff was at the building with his helper, ready, willing, and with the material fully prepared to put on such third coat of hard-

finish plaster, and when about to proceed to do the same, pursuant to the contract, the defendant, without cause, refused to allow the plaintiff to complete such work and forbade him doing so, and compelled him to leave the premises of the defendant. Such findings are abundantly supported by the evidence and must be regarded as having been established. The defendant has paid nothing to the plaintiff on the contract, except what he paid to the plaintiff's helper. Moreover, the defendant contends that the plaintiff is not entitled to recover any compensation in this action by reason of his failure to put on the third coat of hard finish.

Such being the facts it is certain the plaintiff is entitled to recover in this action. The only difficulty we have had in the case is to determine just what amount he is entitled to recover. He certainly is entitled to recover the contract price less whatever it would have cost him to complete the job when he was so stopped by the defendant. Neither party in the court below seems to have reached any definite and satisfactory conclusion. It is found that in preparing the material for the third coat of hard finish the plaintiff and his helper had performed services of the value of $10.50 prior to the time he was so stopped by the defendant; so that the putting on of the third coat of hard finish was well under way when the plaintiff was so stopped. It appears from the evidence that, on measuring the rooms and deducting the doors and windows, there were 864 square yards of the plastering, which at the contract price amounted to $95.04. This amount added to the contract price of the two chimneys made $107.04. Deducting from that amount the $29 paid to the helper, we have a balance of $78.04. The plaintiff concedes that the court allowed him $5.75 more than he was entitled to. In other words, the plaintiff concedes that he is only entitled to recover $54.25, which is $23.79 less than the plaintiff would have received under the contract if the defendant had permitted him to complete the work of putting on

the third coat of hard finish. In view of the services performed by the plaintiff and his helper in preparing to put on that coat of hard finish before he was stopped by the defendant, we must hold that the $54.25 so conceded is no more than the plaintiff is entitled to recover in any view of the case.

It follows, therefore, that the defendant is in no way aggrieved by allowing the plaintiff to recover the amount last stated. Sec. 3048, Stats. 1898; *Olson v. Peabody,* 121 Wis. 675, 681, 682, 99 N. W. 458. But the defendant made no attempt in the court below to correct such error. That being so, it must be regarded as having been waived, and hence is not to affect the question of costs in this court. *Mahon v. Kennedy,* 87 Wis. 50, 53, 54, 57 N. W. 1108; *Andresen v. Upham Mfg. Co.* 120 Wis. 561, 566, 98 N. W. 518. In the first of these cases there was a discrepancy of $7.85 and in the other of $17.25.

By the Court.—The judgment of the circuit court is modified by reducing the amount of the plaintiff's recovery to $54.25, and as so modified is affirmed.

McKeigue, Administrator, Appellant, vs. Chicago & Northwestern Railway Company, Respondent.

January 11—January 29, 1907.

Railroads: Negligence: Death of employee: Compromise and settlement with beneficiary: Executors and administrators: Title in assets: Duties: Trusts and trustees: Cause of action.

1. A settlement made by a railroad company with the sole surviving heir at law of one of its employees, for injuries resulting in the death of such employee, prior to the granting of administration, is binding upon the administrator subsequently appointed, where the assets involved in the settlement are not needed by the administrator for creditors or expenses of administration, and where the assets involved in the settlement,

if recovered by the administrator, will go to the heir who made such settlement.

2. An executor or administrator is invested with the legal title to the personal property of the estate, but holds that title charged with the duty of managing and disposing of the same in accordance with the provisions of the will or of the law.
3. The duties of an administrator or executor are trust duties. In all essential respects he is regarded in courts of equity as a trustee.
4. In the broad sense of the word a trustee is one in whom some estate, interest, or power in or affecting property is vested for the benefit of another. In this sense the term includes executors, administrators, guardians, receivers, trustees in bankruptcy, factors, bailees and agents, and all persons vested with the title or control of property and charged with fiduciary duties in relation thereto for the benefit of another.
5. Beneficiaries of trust property, who are *sui juris* and whose rights are vested, may deal with and convey their equitable interests in the trust property, and the trustee will be required to convey the legal estate in accordance therewith if such action be not contrary to the terms of the trust.
6. On the administration of an intestate estate the beneficiaries of the trust are the creditors of the estate and the heirs at law, and when all creditors have been paid the heirs are the sole beneficiaries.
7. While in an action for the death of plaintiff's intestate, brought to recover damages for the sufferings of the deceased, the damages belong technically to the estate, in the absence of any creditors or other beneficiaries, the recovery is for the sole benefit of the person who is the sole heir at law, and any settlement made by such heir, if *sui juris*, is binding on the administrator.
8. In such case, if there are creditors or beneficiaries who are interested in the recovery, their rights are not affected by the settlement made by such sole heir at law.

APPEAL from an order of the circuit court for Rock county: B. F. DUNWIDDIE, Circuit Judge. *Affirmed.*

This is an action brought by the administrator of the estate of one Broderick, deceased, to recover damages received by said Broderick while in defendant's employ and alleged to have been caused by defendant's negligence. It appears by the complaint that Broderick died about four hours after receiving his injuries and as the result thereof.

The defendant by answer denied all allegations of negligence, and alleged by way of equitable defense that Broderick died intestate leaving no widow, descendants, or ancestors surviving, and but one heir at law, to wit, his sister, Johanna Murphy, who made claim against the defendant for damages on account of Broderick's injuries; that the defendant denied liability for such injuries, but that it compromised and settled said claim with said Johanna Murphy by paying her the sum of $1,000 and receiving from her a full release and discharge of all claims resulting from the injury and death of Broderick; that the time for presentation of claims against the estate of Broderick has fully expired and that but one claim of $232 has been presented; that the personal and real estate left by said Broderick amount to $1,200; and that the injuries sought to be recovered for in this action are the same injuries for which said settlement was made. A general demurrer to this equitable defense was overruled, and the plaintiff appeals.

Edward H. Ryan, attorney, and *O. A. Oestreich,* of counsel, for the appellant.

Edward M. Hyzer, for the respondent.

WINSLOW, J. The question presented by the demurrer is that which was suggested but not decided in the case of *Chicago & N. W. R. Co. v. McKeigue,* 126 Wis. 574, 105 N. W. 1030, where an independent action in equity was brought to enjoin the prosecution of the present action at law, and held not to be maintainable because the facts alleged could be set up as an equitable defense in this action. The question is thus fairly stated by the respondent:

"Is the settlement made by the defendant with Johanna Murphy, sole surviving heir at law of Broderick, deceased, prior to administration, binding upon the administrator subsequently appointed, when the asset involved in the settlement is not needed by the administrator for creditors or ex-

penses of administration, and when the asset involved in the settlement, if recovered by the administrator, will go to said Johanna Murphy?"

We think this question must be answered in the affirmative. An executor or administrator is invested with the legal title to the personal property of the estate, but he holds that title charged with the duty of managing and disposing of the same in accordance with the provisions of the will or of the law. His duties are trust duties. In all essential respects he is regarded in courts of equity as a trustee. 2 Woerner, Adm'n (2d ed.) §§ 383, 500. In the broad sense of the word a trustee is one "in whom some estate, interest, or power in or affecting property is vested for the benefit of another." Hill, Trustees, 41. In this sense the term includes executors, administrators, guardians, receivers, trustees in bankruptcy, factors, bailees and agents, and all persons vested with the title or control of property and charged with fiduciary duties in relation thereto for the benefit of another. Id.; 1 Lewin, Trusts (1st Am. ed.) 490. This is familiar law. Executors, administrators, and guardians are frequently called trustees and held to the responsibilities and duties of trustees by the courts. *Gillett v. Gillett,* 9 Wis. 194; *Hutson v. Jenson,* 110 Wis. 26, 85 N. W. 689; *Abrams v. U. S. F. & G. Co.* 127 Wis. 579, 106 N. W. 1091; *Taylor v. Hill,* 86 Wis. 99, 56 N. W. 738; *In re Thurston,* 57 Wis. 104, 15 N. W. 126; *Foote v. Foote,* 61 Mich. 181, 28 N. W. 90. It is well settled that beneficiaries of trust property, who are *sui juris* and whose rights are vested, may deal with and convey their equitable interests in the trust property, and the trustee will be required to convey the legal estate in accordance therewith if such action be not contrary to the terms of the trust. 2 Lewin, Trusts (1st Am. ed.) 684, 692. In case of an administrator the beneficiaries of the trust are the creditors of the estate and the heirs at law of the intestate. When all creditors have been paid the heirs at law are the sole bene-

ficiaries. In the present case the answer alleges the possession by the administrator of property far in excess of the claims allowed, and further that the time for the presentation of claims has expired. If, therefore, the administrator be allowed to prosecute his claim to judgment he will do so (under the allegations of the answer) solely in order that he may pay the net proceeds to the sole beneficiary who made a settlement of the claim with the defendant before the appointment of the administrator. If this settlement was freely and fairly made, must a court allow the claim to be prosecuted again for the sole benefit of the person who made it and who received and retains the full amount paid in settlement? The statement of the proposition seems its best answer. Such a rule would shock every natural sense of justice. Courts exist to redress or prevent wrongs, not to perpetrate them. Doubtless injustice is often inflicted by the decisions of courts, but this results from defects in legal machinery, the inability of mere human lawmakers to grasp and comprehend the effect of legislation, or from the necessary imperfection of finite judgment and reasoning, rather than from any conscious or intentional departure from the dictates of justice and right. Happily, there are no arbitrary legal rules which prevent the court from administering justice in a case such as is claimed by the answer to exist. This court has already held that the sole beneficiary of a claim for the death of one person by the act or default of another under secs. 4255, 4256, Stats. 1898 (Lord Campbell's Act), has power to make a valid and binding settlement with the wrongdoer notwithstanding the fact that any action for such damages must be brought by the personal representative of the deceased. *Schmidt v. Deegan,* 69 Wis. 300, 34 N. W. 83.

While the present action is brought to recover damages for the sufferings of the deceased and belongs technically to the estate, the essential relations of the beneficiary to the claim for damages where no creditors are interested are the same as

in the *Deegan Case*. In both cases any recovery is for the sole benefit of the person making the settlement who is *sui juris*. If she could make a valid settlement, then of course such settlement, at least in equity, becomes a bar to the prosecution of any action for her benefit by the personal representative. The precise question here presented was answered in the affirmative by the supreme court of Minnesota in *Vail v. Anderson*, 61 Minn. 552, 64 N. W. 47. The same general rule has been applied in other jurisdictions. *Foote v. Foote*, 61 Mich. 181, 28 N. W. 90; *Johnson's Adm'r v. Longmire*, 39 Ala. 143; *Walworth v. Abel*, 52 Pa. St. 370; *Woodhouse v. Phelps*, 51 Conn. 521. See, also, 22 Cyc. 222, 223. Should issue be taken on the answer and it should appear on the trial that, although the alleged settlement was made, still there are creditors or other beneficiaries who are interested in the recovery, their rights will not, of course, be affected by the settlement made with Johanna Murphy.

By the Court.—Order affirmed.

QUINN, Appellant, vs. QUINN and others, Respondents.

January 11—January 29, 1907.

Deeds: Equity: Undue influence: Presumptions.

1. In case of a conveyance by an aged person, susceptible to undue influence, of his entire property, without consideration, to one in a position of trust and confidence, under suspicious circumstances which satisfactorily suggest the wrong, accompanied by proof of opportunity and disposition on the part of the beneficiary to exert influence, there arises a presumption that the conveyance was so induced, unless the grantee can negative that fact by direct proof.
2. In an action to set aside a deed given under such circumstances, the competent evidence, stated in the opinion, is *held* not to negative such presumption, and to present a situation precluding reversal of a finding of undue influence.

APPEAL from a judgment of the circuit court for Dodge county: JAMES J. DICK, Circuit Judge. *Affirmed.*

Action by heirs to set aside a deed executed by Richard Quinn, now deceased intestate, to the appellant, his son, on October 31, 1903, in consideration of one dollar and a bond secured by mortgage, on the part of appellant that he would support the grantor, according to certain details, including medical attendance, and, within one year after the grantor's death, would pay $200 to the pastor of the grantor's church, and provide proper burial; the deed being attacked on the ground both of mental incompetency of the grantor and fraud and undue influence on the part of the appellant. It appeared, substantially without dispute, that Richard Quinn was a man about 100 years old, with two sons and six daughters, all of mature years, the eldest living being about seventy-four years of age. Some fifteen years before his death he had conveyed eighty acres to his son *John* and another eighty acres to his son *Michael,* this appellant, retaining eighty acres upon which he had thereafter lived, being supported by the rents thereof. He had often declared his purpose that out of this eighty should be provided, at his death, money for his daughters. Appellant was a well-to-do farmer, having some 200 acres adjoining his father's farm. After some experiments in renting the land to other relatives, the remaining eighty had for the past few years been rented to appellant, in consideration of his furnishing his father board and paying him either $100 or $150 per year. In October, 1903, he gave up his attempt to live in his own house and went to the appellant's, about three quarters of a mile away, to live. On October 31st the appellant and his father went to the office of a lawyer in Watertown, and together gave directions to draw a deed of the remaining eighty to *Michael,* and the bond and mortgage back, above described, which papers were executed in the presence of that attorney, and at the direction of both the deed was at once recorded. The trial court found

that the property in question was worth $6,500, and was all that Richard Quinn owned, except unascertained moneys held or indebtedness owed by *Michael Quinn* for back rent; that Richard could neither write nor read writing, and at the time of the execution of the deed was incompetent and mentally incapacitated to make a valid deed of any of his property; that for several years before Richard Quinn had been entirely dependent upon the appellant to care for him and to transact all his business, purchasing his clothing and necessaries of life, and the like; that, although it would have been entirely convenient to do so, no notice or information was given to any of the other children of the purpose to execute this deed, or of its execution, except by placing it on record; that the appellant took his father to the attorney's office to have the deed executed; that, owing to the enfeebled condition of Richard in mind and body, appellant took undue and unconscionable advantage of him and thereby obtained the deed, and that the same was not the free or voluntary act of the grantor; that Richard Quinn died July 16, 1904, after about four months of paralysis; that appellant had had the possession and occupation of the premises from the time of the execution of said deed, which was worth $250 a year, and that the board and care of his father, together with the sums paid out by him in accordance with said bond, amounted to about $450, whereupon judgment was entered vacating and declaring void said deed, but providing that appellant should retain the use and enjoyment of the premises until October 31, 1905, as full compensation for his services to, and expenditures for, his father. From that judgment the defendant, *Michael Quinn,* appeals.

For the appellant there was a brief by *Skinner & Thauer,* attorneys, and *James E. Malone,* of counsel, and oral argument by *Mr. Malone* and *Mr. Nicholas Thauer.*

John G. Conway, for the respondents.

DODGE, J. If either of the findings of the trial court that Richard Quinn was mentally incompetent to execute the deed, or that his execution thereof was procured by undue influence of the appellant, is sustained, of course the judgment setting aside that deed is correct. We might have difficulty in reaching concurrence with the first of these findings, but, inasmuch as we have concluded that the latter cannot be reversed, we shall find it unnecessary to discuss any other question upon that branch of the case.

In this, as in so many others of this class of cases, there is no direct proof of the exertion of any influence or solicitation by the beneficiary upon the grantor to induce the specific act assailed. Since such transactions are usually secret and confined to the two parties, those attacking the conveyance after the death of the grantor have ordinarily no means of establishing what took place save by the testimony of their antagonist, and, in deference to the frequency of this situation, has been laid down the rule of law that in case of a conveyance by an aged person, susceptible to undue influence, of entire property, without consideration, to one in a position of trust and confidence, under suspicious circumstances which satisfactorily suggest the wrong, accompanied by proof of opportunity and disposition on the part of the beneficiary to exert influence, there arises a presumption that the conveyance was so induced, unless the grantee can negative that fact by direct proof. Substantially all the decisions upon this subject up to that time were collected, and many of them discussed, in *Vance v. Davis,* 118 Wis. 548, 95 N. W. 939, which has been succeeded by a careful discussion and elucidation of the rule in *Winn v. Itzel,* 125 Wis. 19, 103 N. W. 220. The trial court doubtless held the facts sufficiently proved to bring the present case within that rule, and that is the first question for consideration here.

An examination of the record discloses plenty of evidence tending to establish a greatly enfeebled mental condition of

Richard Quinn; also great, if not complete, reliance upon the appellant for acts involving business judgment or choice. For years he had surrendered all attempts at the management of his farm, had turned its use over to the appellant, who, apparently, had also made all purchases of necessaries for his father, which seem to have been practically limited to clothing and tobacco, besides which there is proof of the actual exertion of influence by appellant over his father back as far as five or six years before this transaction, inducing him to quarrels with his prior tenants and to rejection of them and repudiation of his contracts. There is evidence to strongly indicate that, for the last five years, the father, like a young child, received from the hand of that son every necessary of life. From such evidence we are convinced that the trial court was justified in its conclusion that the grantor was susceptible of undue influence in business affairs and that there was shown a disposition on the part of the beneficiary to exert influence, and that a situation of trust and confidence and of reliance by the father on his son existed between them. The element of opportunity, the absence of which was very significant in *Vance v. Davis, supra,* was also inferable from the obvious fact that the matter of this conveyance had been subject at least of conference between appellant and his father, privately, as shown by the fact that they went together to an attorney to have the deed drawn and that appellant participated with his father in giving direction to such attorney. The conveyance covered the entire property within the control of the grantor, and was so far in excess of the probable value of the services to be rendered as to be practically a gift. Improbability of the voluntary character of the act is suggested by the fact that valuable property had already several years before been given by Richard to the appellant with the declared purpose of retaining this remnant of his land as a means of providing portions for the daughters, many of whom were in needy circumstances

and none of them affluent, while the appellant had become entirely well to do. The element of secrecy, which in some cases has been given great prominence in raising the presumption of undue influence, was present in the sense that no other member of the grantor's family was given any opportunity to confer with him upon it, and, while we are not inclined to give great significance to mere omission to consult with others, in the absence of other significant facts, yet in the presence of those here presented the failure of the appellant to give either brother or sisters an opportunity to confer with their father before the disposal of this last remnant of his once considerable estate is at least consistent with the hypothesis that he had, by means of his situation of confidence and influence, induced his father to perform this act. True, on many of these subjects there was conflict of evidence, but not such that we are able to affirm such clear preponderance against the trial court's finding as would warrant us in setting it aside. Thus we think the court was justified in finding the existence of every fact and condition to establish *prima facie* that this deed was the fruit of what the law dominates as undue influence—the subordination of the will of the grantor to that of the grantee.

The next question is whether that fact has been negatived by direct evidence. To that end is presented first the testimony of the lawyer who drew the deed, which certainly tends to show that the grantor understood the plan effectuated thereby, and consciously and intentionally gave the directions and assented thereto, but the interview at which this was done was, according to the same testimony, pervaded by the presence and participation of the appellant, and is barren of direct evidence from the mouth either of the attorney or of the appellant himself that the latter did not, even at the interview with the attorney, dominate and direct the father's will. The only other direct evidence is testimony of the appellant himself to a private interview with his father, at which the

latter expressed the wish to make the arrangement consummated by the deed, bond, and mortgage, and the declaration that at no other time did he solicit or request the same. This evidence was taken under and subject to objection to appellant's competency to testify to a transaction between himself and his deceased father. It was clearly inadmissible and the witness incompetent. No witness had either affirmed or denied or attempted to testify with reference to any transaction between appellant and Richard Quinn having relation to this conveyance or the disposition of the property. Sec. 4069, Stats. 1898, in the clearest terms denies competency of the beneficiary under such a deed to testify to such transactions with the grantor, except only in case the opposite party shall first be examined or examine some other witness in his behalf concerning the specific transaction or communication. *Martin v. Hillen,* 142 N. Y. 140, 36 N. E. 803. There was evidence more or less in conflict tending to support inference that Richard Quinn might voluntarily have changed his desire or purpose to provide out of this land for his daughters. Other facts and circumstances having a contrary tendency were presented. There was evidence for and against conduct on appellant's part claimed to evince disregard of both filial and contract duty toward his father and a disposition to take pecuniary advantage of the latter's asserted helplessness. Indeed, the relations between Richard Quinn and his children, the degree of his mental decadence, and appellant's attitude and behavior toward him were involved in a flood of conflicting testimony to inconsistent facts and circumstances. In such situation we cannot feel justified to invade the trial judge's function of passing on the credibility of the testimony or the significance of involved and correlated circumstances and conduct nor to conclude that the finding of undue influence is against the clear preponderance of all the evidence.

By the Court.—Judgment affirmed.

MARSHALL and TIMLIN, JJ., dissent.

McGowan, Respondent, vs. City of Watertown, Appellant.

January 11—January 29, 1907.

Trial: Colloquy between court and counsel: Appeal and error: Prejudicial error: Municipal corporations: Streets: Negligence: Personal injuries: Special verdict: Refusal to submit requested questions: Parties: Joinder.

1. It is competent for the trial judge in a mere colloquy with counsel, instigated by the latter, to test the contention of counsel by inquiry or counter suggestion, and expression of an erroneous opinion by the trial judge to counsel during such discussion, although in the presence of the jury, except in rare cases of obvious prejudice, is not ground of reversal when the conclusion finally reached and carried into effect, either by ruling on evidence or instruction to the jury, is correct.
2. An excavation, consisting of a sewer trench, in the traveled part of a highway is a defect unless guarded by sufficient barriers.
3. In an action for injury received from driving into a sewer trench, the court submitted as one question of the special verdict the following: Was the street in a reasonably safe condition for public use? and this question, together with the next relating to notice and time to remedy defects, under the instructions is *held* to fully cover and include all the elements asked to be submitted by three requested questions, whether the trench was guarded by the use of proper lights or otherwise, so as to prevent danger; whether such lights or either of them had been removed or extinguished; and whether, if so, that was due to negligence of the defendant. The three requested questions were mere cross-examination of the jury.
4. In such action the defendant is not prejudiced by the refusal of the court to join as defendants the persons who, under license from the city, dug the trench, and who, by virtue of the city ordinances and a bond, were required by the city to take certain specified precautions and to reimburse the city for any damages which might fall upon it by reason of their default therein.
5. In such case the liability of such third parties was at best secondary, a liability on contract to the city, and their presence or absence in the action could have no effect upon the rights of the plaintiff or the liability of the city to him.

APPEAL from a judgment of the circuit court for Dodge county: JAMES J. DICK, Circuit Judge. *Affirmed.*

Action to recover for injury resulting from defect in highway, occurring on the night of May 13, 1905. It was alleged and established that on the 12th and 13th of May a trench was dug from the west curb of North Washington street to a point east of the center of the street to connect with the sewer therein by persons licensed to do so by the city but in the employ of private individuals. Between 9 and 10 o'clock on the evening of the 13th—a dark and stormy evening—the plaintiff was driving his horse in a two-wheeled cart northward on that street, with no knowledge of the existence of such trench. He saw a red lantern somewhat east of the middle of the street and turned his horse to the west side and drove into the ditch, whereby the horse was killed and the cart and harness damaged. There was evidence that the diggers had placed a red lantern at the eastern extremity of the trench and also one at the west end near the curb, and some evidence that they placed barriers at the easterly end. The height of the bank of earth adjoining the trench was in some dispute, and whether the westerly lantern was burning at the time of the accident, also the extent to which the place was lighted by an electric street light 185 feet away, but claimed to be obstructed by foliage. The court first, on application of defendant, made order joining as defendants the persons who dug the trench, but at the commencement of the trial vacated such order. A special verdict was taken wherein the jury found that (1) plaintiff suffered the injury; (2) the street at the place was not in a reasonably safe condition for public use; (3) the officers of the city had notice of such insufficient condition for a sufficient length of time to have placed and maintained the street in a reasonably safe condition for public use by the exercise of reasonable diligence; (4) such insufficient condition was the proximate cause of the injury; (5) plaintiff was not guilty of contributory negli-

gence; and (6) damages. After overruling a motion to set aside this verdict, judgment was entered thereon in favor of the plaintiff for the amount found, from which the defendant appeals.

C. A. Kading, city attorney, and *M. L. Lueck,* of counsel, for the appellant.

Harlow Pease, for the respondent.

DODGE, J. 1. The first assignment of error is predicated upon certain remarks of the court apropos of a discussion by counsel as to the admissibility of an ordinance requiring that drain layers should guard any excavation in the streets by barriers and lighted lamps. Counsel for plaintiff summarized the provisions of the ordinance as requiring that any opening be inclosed with sufficient barriers, etc., and the court said, "that is declaratory of the common law." Counsel for defendant: "We object to the remarks of the court." By the court: "The whole question is for the jury to say whether they were negligent or not; a barrier is not necessarily a protection, it must be a sufficient barrier. I have charged it in several cases that have gone up and been sustained"—to which remarks the defendant excepted. This assignment of error cannot be sustained. This was merely colloquy between court and counsel, instigated by the latter, in which it was certainly competent for the court to test the contention of counsel by inquiry or counter suggestion. While the jury were present, there being no request for their withdrawal, these remarks were not addressed to them, but their duty was fully explained to them in the charge to consider all the evidence as to the situation, presence or absence of lights and of barriers, and sufficiency of the latter, and therefrom to reach the conclusion whether the street at this place was in a reasonably safe condition for public use. Under the instructions given, the jury were permitted to find the street safe even though no barriers had been erected. The expression of an erroneous opinion by

the court to counsel during a discussion, although in the presence of the jury, except in rare cases of obvious prejudice, cannot be ground of reversal when the conclusion finally reached and carried into effect, either by ruling on evidence or instruction to the jury, is correct. *Gilchrist v. Brande,* 58 Wis. 184, 192, 15 N. W. 817; *Stiles v. Neillsville M. Co.* 87 Wis. 266, 271, 58 N. W. 411; *Baker v. State,* 88 Wis. 140, 156, 59 N. W. 570; *Owen v. Long,* 97 Wis. 78, 83, 72 N. W. 364; *Brown v. Warner,* 116 Wis. 358, 362, 93 N. W. 17. In such discussions it is essential that the court have the fullest opportunity to understand and test positions assumed by counsel, and, to that end, to put hypothetical questions, suggest counter arguments, and the like, though of course this should be done carefully when in the presence of the jury, and in such a way as not to convey to them an impression that the court has formed an opinion on a subject properly within their province. Another reason why this assignment of error must be overruled is that the rule of law announced by the court that an excavation such as this in the traveled part of a highway is a defect unless guarded by sufficient barriers is fully sanctioned by the decisions of this court. *Kenworthy v. Ironton,* 41 Wis. 647, 656; *Prideaux v. Mineral Point,* 43 Wis. 513, 523; *McGrath v. Bloomer,* 73 Wis. 29, 31, 40 N. W. 585.

2. The next assignment of error is predicated on the refusal of the trial court to submit to the jury in the special verdict questions whether the trench was guarded by the use of proper lights, or otherwise, so as to prevent danger; whether such lights or either of them had been removed or extinguished; and whether, if so, that was due to negligence of the defendant. In present case this was mere cross-examination of the jury. The question submitted was whether the street "was in a reasonably safe condition for public use;" and this question, together with the next relating to notice and time to remedy defects, under the instructions, fully covered and included

all of the elements asked to be submitted by these three questions. The jury were told to consider what barriers had been erected, what lamps had been supplied, and whether those lamps or either of them had become extinguished, and whether, as they found all of such facts to be, the result was a condition of reasonable safety for persons traveling the street in the exercise of due care; also whether such insufficiency as they found to exist had occurred so recently as to excuse defendant from curing it. The form of the special verdict is very much in the discretion of the court, and, in all ordinary cases of injury from alleged defects in highways, the question submitted by the court is sufficient to cover all the elements suggested by these requested questions. *Mauch v. Hartford,* 112 Wis. 40, 87 N. W. 816; *Byington v. Merrill,* 112 Wis. 211, 88 N. W. 26; *Baxter v. Krainik,* 126 Wis. 421, 105 N. W. 803. True, there may be facts put in issue by the pleadings of such a character that, in the absence of request for their special submission, they might be deemed covered adequately by the general question, but which should be submitted by separate question if so requested. *Schrunk v. St. Joseph,* 120 Wis. 223, 229, 97 N. W. 946; *Jenewein v. Irving,* 122 Wis. 228, 235, 99 N. W. 346, 903; *Olwell v. Skobis,* 126 Wis. 308, 105 N. W. 777. But those now under consideration are not at all of that character. In the first place, the existence or nonexistence of a light or lights is not in issue by the pleadings, the only allegation therein being the existence of a trench not properly inclosed or guarded by other proper precautions, which is met merely by the general denial. Besides, the jury were so carefully instructed that they must have passed upon these questions in answering the general question which was submitted to them by the court.

3. We can discover no ground for reversal in the error assigned upon ultimately refusing to join as parties defendant the persons who, under license from the city, dug this trench, and who, by virtue of an ordinance and bond, were required

by the city to take certain specified precautions and to reimburse the city for any damages which might fall upon it by reason of their default therein. The liability of such third parties was at best secondary, and was a liability on contract to the city. Their presence or absence in the present action could have no effect upon the rights of the plaintiff or the liability of the city to him. Hence the defendant is in no wise prejudiced by the refusal of the court to join them as additional defendants, even if such joinder were permissible, which we do not decide.

We find no prejudicial error, and, therefore,

By the Court.—Judgment affirmed.

IN RE KINGSTON'S ESTATE.

January 11—January 29, 1907.

Remainders: Sale under order of court: Procedure: Statutes: Construction.

1. Under ch. 300, Laws of 1899, authorizing a sale of future contingent interests in land in all cases wherein the court may find a sale to be substantially promotive of the interests of the parties, it was not intended to confer upon courts powers additional to those theretofore exercised for the sale of interests in lands, but to prescribe a procedure to effect such sales; and hence interests in remainder belonging to the children of a devisee for life, or, should he die without issue, to testator's children or their issue, cannot be ordered sold in such a way as will result in a complete separation of such remainder from the life estate.
2. In such case, if some disposition of an interest in the estate must be made for the purpose of obtaining funds to discharge liens and claims created against it by the testator, and for its preservation, it is proper to raise the necessary sums by mortgage or by a sale of part or all of the estate, and to appropriate so much of the proceeds as may be required to free it from such liens or claims to that purpose, the remainder to be kept in lieu of the real estate and held for the use and benefit of the parties as intended by the testator in his devise of the real estate.

APPEAL from an order of the circuit court for Waukesha county: JAMES J. DICK, Circuit Judge. *Reversed.*

William Kingston died testate January 14, 1902. He left real estate consisting of two farms. In his will various bequests were made, and they, as well as the debts and a mortgage upon the lands, were made a charge against the real estate, which was disposed of as follows: One farm was devised to the testator's son Goodhand in fee. To another son, *Thomas,* a life estate in another farm was devised, with remainder to his son's issue living at the time of his death, and, in the event of his leaving no living issue, then remainder over to the children of the testator and to the child or children of any deceased child by right of representation. The will was duly admitted to probate and the sons Goodhand and *Thomas* were appointed executors. On November 28, 1903, the county court made an order, on petition of one of the legatees, requiring the executors to apply within sixty days to said court for a judicial construction of the will and for license to sell so much of or such parts or interest in the estate as would be proper for the purpose of satisfying the charges against the lands. The bequests made by the will, the debts of the testator, and a mortgage upon the lands were made a charge by the will upon the real estate of the testator; one half upon the farm devised to Goodhand and one half upon the farm in which *Thomas* was given a life estate. Before the executors had complied with the order of the county court *Thomas Kingston* applied to the circuit court under ch. 300, Laws of 1899, for an order for the sale of the interests of the remaindermen in the estate, alleging that he had been unable to raise money on his life estate to pay the charges against the land, and also alleging that the remaindermen would be benefited by a sale of their interests. The court entertained the application and appointed a referee for the purpose of effecting a sale, and also appointed a referee to inquire into and report to the court upon the matters alleged in the appli-

cation. The referee found that the amount chargeable against the real estate in which *Thomas Kingston* was given a life estate amounted to $2,648.39; that the personal property in the hands of the executors was wholly inadequate to pay the charges against the estate; that owing to the peculiar provisions of the will it was impossible to raise funds upon this land by mortgage or otherwise to pay the charges; that the remaindermen's interests were liable to be jeopardized by the inability of the life tenant to protect them from waste and the demands of legatees and creditors; that the estates in remainder were unproductive, and that the interests of the owners would be benefited by a sale thereof. The court approved the findings of the referee and ordered a sale of the interests of the remaindermen. This is an appeal from the order directing such a sale.

For the appellants the cause was submitted on the brief of *Connell & Weidner,* attorneys, and a separate brief by *T. E. Ryan,* guardian *ad litem,* and for the respondent on that of *Tullar & Lockney.*

SIEBECKER, J. The petitioner asks the court to authorize a sale of all the estates in remainder in the real estate described in the application, in which he is given a life estate by the will of his deceased father. The petition alleges that petitioner is unable to pay the charges against this property under the provisions of his father's will; that because the title is held by various parties he is unable, by loan upon his interest, to obtain an amount to pay such charges; and that a sale of the estates in remainder would promote the interests of such owners by protecting them from threatened loss and possible destruction of their interests. Manifestly petitioner proceeds upon the theory that ch. 300, Laws of 1899, authorizes a sale of such interests in all cases wherein the court may find a sale to be substantially promotive of the interests of such parties. An attempt to grant such power to the courts, to in-

voluntarily alienate the title to real estate, would seemingly be an improper interference with private vested rights and be of doubtful validity. If the legislature intended to confer such a power, the grant should appear in clear and explicit terms in the act. An examination of the context of the statute does not disclose such an intent of the legislature in clear and unmistakable terms. The purpose expressed in its provisions is in harmony with the idea of providing a method by which the title to property of persons under legal disability can be alienated in cases theretofore well recognized in the law, for the promotion of the interests of such owners, by preserving the subject and title of such estates when subjected to peril of loss and destruction, which can only be avoided by a sale and an application of the proceeds to the relief of the estate from such danger. The provisions of the act are mainly regulative of such proceedings, and are appropriate to effect an involuntary alienation of the title to real property in these well-recognized cases. The object to which the provisions are addressed is to furnish a method of turning land into money, and, as an incident thereto, to free the land from its burdens and preserve the proceeds *in solido,* keep them invested for the benefit of those who are or might become interested in the land, and to hold the proceeds and treat them with respect to the rights and interests of the parties as standing in lieu of the land. A consideration of these provisions and the general object of the statute, as gathered from the context, convinces us that it was not intended to confer on the courts additional powers to those now exercised for the sale of interests in lands, but that the statute should be restricted to prescribing a procedure to effect such sales. In this view of the statute, the primary inquiry arises as to whether petitioner has shown good ground upon which the court may direct a sale of the interests in remainder created by the will. Under the will petitioner owns a life estate in the property; upon his death, remainder over in fee to his living issue, and, in case he leaves

no living issue at his death, remainder over in fee to testator's other children in equal shares. The object of the application, as we have seen, is to dispose of the interests in remainder for the purpose of separating them from those of petitioner's life estate. Such disposition is asked upon the alleged ground that he, as life tenant, is unable to discharge the liens and charges against the property, and that such sale would promote the interests of such owners in remainder by protecting their estates from threatened loss and destruction by reason of his inability to free the property from such liens and charges. The question thus presented has been considered and determined by this court in the case of *Ruggles v. Tyson,* 104 Wis. 500, 79 N. W. 766, 81 N. W. 367, where the rights of parties and the power of the court to transfer the title to property under like circumstances was presented and exhaustively considered. It is there declared:

"It is not doubted but that the powers of a court of equity are ample to prevent the destruction of the estate in remainder" under such circumstances. "Rather than that the scheme of the creator of such estate shall entirely fail by reason of some circumstance not foreseen by him and provided for, the court may intervene, but only for the purpose of preserving, and so far as necessary to preserve, the property. If it cannot be preserved in the form intended it may be preserved in its equivalent." Cases cited in *Ruggles v. Tyson,* 104 Wis. 507, 79 N. W. 768.

To accomplish this result the interests in remainder are to be preserved, as nearly as the circumstances will permit, as the creator of them has provided. It is also established that there can be no separation of the interests of the life tenant from those in remainder and that the estate must be maintained *in solido* as intended and provided by the grantor to the time of distribution, unless the court encounters some insurmountable obstacle which prevents effectuating such a purpose. Applying these principles to the facts here presented, it is manifest that petitioner's proceeding is erroneous in seek-

ing to effect a sale of the interests in remainder, for the obvious reason that this would result in a complete separation of these interests from the life estate and thus frustrate the very object of the testator.

It is also manifest that the facts and circumstances wholly fail to show any necessity for such a separation. It is apparent that if some disposition of an interest in the estate must be made for the purpose of obtaining funds to discharge the liens and claims against it for its preservation, it will in all probability be entirely feasible and practicable to obtain relief either by mortgaging the land to raise the required sum, or that a sale of a portion of the premises may be made and the proceeds applied to the payment of such liens and claims, and, in the event that the land cannot be sold in parcels, the whole may be sold and so much of the proceeds as may be required to free it from claims be appropriated to that purpose, and the remainder be kept in lieu of the real estate and held for the use and benefit of the parties as intended by the testator in his devise of the real estate. Under these circumstances the application to dispose of the estates in remainder and thus separate them from the life interest should have been denied and the proceeding have been dismissed.

This renders discussion of the other questions presented, as to the propriety of this proceeding in the circuit court during the administration of the estate by the county court, and as to the advisability of ordering a sale in case the proceedings were proper, immaterial and unnecessary, and we therefore refrain from considering them.

By the Court.—The order appealed from is reversed, and the proceeding is remanded to the circuit court with directions to dismiss the application.

MEYER, Respondent, vs. LADEWIG, Appellant.

January 12—January 29, 1907.

Master and servant: Injuries from simple tools: Duty to inspect: Instructions to jury.

1. A machinist's hammer is a simple tool, and no duty of inspection rests upon the master in respect thereto.
2. The rule that a master is not obliged to inspect a simple tool rests upon the assumption that the servant is in as good, if not better, position to observe any defects as the master.
3. In an action against a master to recover for injuries received by a servant and caused by a splinter of steel flying from a hammer used by the servant, striking him in the eye and causing loss of sight, the court instructed the jury that ordinary care on the part of the master required reasonable inspection by him of the tools and appliances furnished by him to ascertain whether or not they were in a reasonably safe condition for use. *Held*, the hammer being a simple tool, that the instruction was erroneous.

APPEAL from a judgment of the circuit court for Waukesha county: E. B. BELDEN, Judge. *Reversed.*

This action was brought to recover damages alleged to have been sustained by plaintiff in consequence of injuries received by a splinter of steel flying from a hammer, striking him in the eye and causing loss of sight. The charge of negligence is that the defendant furnished his employees with all tools, machines, and other appliances necessary for carrying on the work; that it became the duty of plaintiff to assist other employees in making repairs upon a boiler, and that such repairs consisted in the removal and replacing of certain flues; that it was necessary to perform this work in the nighttime, plaintiff being directed by defendant to assist in the work; that to perform such work hammers of certain shapes, weights, and temper were required; that plaintiff was furnished by too hard and brittle, in consequence of which a piece of steel defendant with a hammer which was improperly tempered

flew off the same while plaintiff was using it and destroyed the sight of his right eye; that the hammer should have been annealed in order to make it safe for such use; and that plaintiff did not know this, and defendant did. The answer put in issue the material allegations of the complaint, and alleges that the hammer was made by a competent toolmaker and had been used constantly by defendant for many years; that its condition was obvious to any one using it, and that the accident was caused by the manner of using rather than by its condition; and that plaintiff was guilty of contributory negligence. Upon the trial a special verdict was found by the jury as follows:

"(1) Was the hammer used by the plaintiff at the time of his injury reasonably safe for the use to which it was put by him at that time? *A.* No. (2) If you answer the first question 'No,' then was the defendant guilty of negligence in furnishing said hammer to plaintiff for the purpose of doing the work that plaintiff was directed to do at the time in question? *A.* Yes. (3) If you answer the second question 'Yes,' then was such negligence the proximate cause of plaintiff's injury? *A.* Yes. (4) Was the plaintiff guilty of any want of ordinary care which contributed to his injury? *A.* No. (5) In what sum do you assess plaintiff's damages sustained by reason of the injury complained of? *A.* $5,000."

The usual motions were made on behalf of the defendant, which were overruled and judgment entered upon the verdict in favor of the plaintiff, from which this appeal was taken.

For the appellant there was a brief by *Vilas, Vilas & Free-* [illegible] and oral argument by *E. P. Vilas.*

ting flues in a boiler. He did some work with a light hammer of his own and afterwards called for a heavier one, which was given him by one of the employees, and which he was using when injured. The work was being done in the night-time by the light of a candle. In putting in the flues it was necessary that the ends should be rolled out. For this purpose an iron instrument, known as a rolling pin or flue roller, was inserted in the end of the flue and the outer end struck with a hammer, the effect being to make the flue water-tight. The plaintiff was working at the end of the boiler in a space four feet two inches by two feet three inches and seven feet high, driving in the flues, when a splinter flew from the hammer he was using, causing the injury. When injured he was standing in a cramped position, owing to lack of room, and striking a left-hand blow with both hands upon the rolling pin, which was sticking out about nine inches, so that there was not much room between the wall and the rolling pin after it was in the flue. The plaintiff testified:

"There isn't much room between the wall and the rolling pin after it is in the flue to strike a big square blow. You have to cramp your hammer around to get any force on it."

After the accident it was found that there were about ten chips out of the edge of the striking face of the hammer, and only two of them appeared to be fresh or recently broken out. There is evidence that the chipping might be caused by striking an unsquare or glancing blow or by the hammer or roller being too hard; that if a hammer was too hard it could be remedied by annealing; that it would be impossible to tell by looking at this hammer whether it was too hard or too soft; that plaintiff had worked many times in the night on the same kind of work with this hammer, it having been in use there for several years; that whether this hammer was too hard could only be discovered by using a file on it, and upon testing it the morning after the injury it was found to be hard; that constant pounding will cause hammers to grow harder; that the work required a hammer pretty hard, just hard

enough so a file would cut it; and that such a hammer would be liable to chip if struck with a glancing blow. There is no evidence of any actual knowledge on the part of the defendant that the hammer was too hard or in any way defective or unsafe.

But it is claimed on the part of the plaintiff that it was the duty of defendant to inspect, and the case was tried and submitted to the jury upon that theory. So the main and controlling question is: Did the duty of inspection rest upon the defendant? If the hammer was a simple tool there was no such duty. In *Stork v. Charles Stolper C. Co.* 127 Wis. 318, 322, 106 N. W. 843, this court said:

"Another qualification of the master's liability indulged in case of such simple tools and appliances is exemption from a duty to inspect to ascertain the development of defects or disrepair in the course of their use, based also upon the assumption that such conditions are as much within the observation of the employees as of the master, if not more so."

In the above case the tool in question was a monkey wrench, which appears to be more complicated in its construction than a hammer, and the liability of the master was based upon actual knowledge brought home to him of the defects, and it was held that, while the rule was relaxed so as not to make a master liable in case of failure to inspect, he was nevertheless liable when he had actual knowledge of the defect. It would seem that an ordinary hammer is one of the most simple of tools.

"There is no complication about a hammer. It is not a piece of machinery which requires any attention whatsoever to keep in order. It cannot get 'out of fix,' unless the handle breaks. It requires neither art, science, nor skill in its use; brawn and muscle do the work, and it is known to be one of the most harmless of all tools to the person using it. Should a flaw or other patent defect exist, it would more certainly appear to the person undertaking to work with it, whose duty it would be to make it known to his employer." *Martin v. Highland Park Mfg. Co.* 128 N. C. 264, 265, 38 S. E. 876.

But it is insisted that the hammer in question was not an ordinary hammer, that the handle was short so as to admit of use in cramped quarters, and that it should be of a certain temper, neither too hard nor too soft—just hard enough so a file would take hold of it. Clearly the length of the handle did not render the tool complicated or even difficult to understand. And it appears from the evidence that a blacksmith's hammer with a short handle would do the work. The hammer was put in evidence and is before this court. It is such as is usually found in machine shops, and it shows chips out of the edge of the face, which, as the evidence shows, might have been caused by striking an unsquare or glancing blow. About ten of these chips were out, and obvious to any one using the hammer before the accident. Plaintiff used it off and on at the same kind of work for a period of two years before the injury. He was a machinist, and doubtless no one was in better position than he to know whether it was too hard. The rule that a master is not obliged to inspect simple tools rests upon the assumption that the servant is in as good, if not better, position to observe any defects as the master. *Stork v. Charles Stolper C. Co.* 127 Wis. 318, 322, 106 N. W. 841; 1 Labatt, Master & Servant, § 154; *Garnett v. Phœnix B. Co.* 98 Fed. 192; *Dompier v. Lewis,* 131 Mich. 144, 91 N. W. 152; *Webster Mfg. Co. v. Nisbett,* 205 Ill. 273, 68 N. E. 936; *Georgia R. & B. Co. v. Nelms,* 83 Ga. 70, 9 S. E. 1049; *Cregan v. Marston,* 126 N. Y. 568, 27 N. E. 952; *Wachsmuth v. Shaw E. C. Co.* 118 Mich. 275, 76 N. W. 497; *Hefferen v. N. P. R. Co.* 45 Minn. 471, 48 N. W. 1, 526; *Rawley v. Colliau,* 90 Mich. 31, 51 N. W. 350; *Martin v. Highland Park Mfg. Co.* 128 N. C. 264, 38 S. E. 876; *Marsh v. Chickering,* 101 N. Y. 396, 5 N. E. 56; *Lynn v. Glucose S. R. Co.* 128 Iowa, 501, 104 N. W. 577; *Louisville, E. & St. L. C. R. Co. v. Allen,* 47 Ill. App. 465; *Koschman v. Ash* (Minn.) 108 N. W. 514; *Corcoran v. Milwaukee G. L. Co.* 81 Wis. 191, 51 N. W. 328;

Borden v. Daisy R. M. Co. 98 Wis. 407, 74 N. W. 91; *Olson v. Doherty L. Co.* 102 Wis. 264, 78 N. W. 572; *Relyea v. Tomahawk P. & P. Co.* 110 Wis. 307, 85 N. W. 960. In *Relyea v. Tomahawk P. & P. Co., supra,* this court said:

"These perils were plain before his eyes. He must be deemed to have accepted them and assumed the risk. If, on the other hand, those perils had developed in the natural course of the use of the appliances by himself and his companions, failure to observe them would be quite as inconsistent with due care on his part as on the part of any representative of the employer, for the very use he made of them, namely, the opening and closing of the board and stepping thereon in the course of his work, was obviously the surest means of discovering such defects as are now claimed to have existed."

In many of the above cases it was held that a hammer is a simple tool, and some of them are very similar in facts to the one before us. Others are similar in principle. We think the cases cited by respondent generally can be differentiated from the instant case. The question whether the hammer was defective in its construction or when furnished by the master was not tried. The question litigated and passed upon by the jury was whether it was reasonably safe at the time of the injury, and the jury were told that ordinary care on the part of the defendant required "reasonable inspection by the master of the tools or appliances to ascertain whether or not they are in a reasonably safe condition for such use." We think the weight of authority and the better reason bring the hammer in question within the category of simple tools, and therefore, if it was reasonably safe when furnished and free from obvious defects, the law imposed no duty upon the master to inspect. Of course the rule is too well settled to require discussion that the master must furnish reasonably safe tools and implements, and the question whether he did so in this case seems to have been lost sight of in the effort to prove that the tool was not safe at the time of the injury and

that defendant was guilty of negligence because he did not inspect. There is no evidence of custom to inspect in the case before us. The hammer was furnished to the plaintiff at least two years before the injury. There were no obvious defects when furnished. A toolmaker was provided to whom tools were taken by the servants for repair when necessary. We shall not prolong this opinion by a review of the many authorities cited by counsel for respondent nor by a discussion of the questions raised and argued. It is frankly conceded that if the hammer is a simple tool, as we hold it is, the charge to the jury was erroneous.

Other errors discussed need not be considered, since the questions presented by them are not likely to arise upon another trial. It follows from what has been said that the judgment of the court below must be reversed.

By the Court.—The judgment of the court below is reversed, and the cause remanded for a new trial.

THE STATE, Respondent, vs. JONES, Appellant.

January 12—January 29, 1907.

Officers: Eligibility: Disqualification by holding another office.

The offices of county judge and justice of the peace are incompatible, and a county judge vacates his office by accepting the office of justice of the peace. *State ex rel. Knox v. Hadley*, 7 Wis. 700, followed.

APPEAL from a judgment of the circuit court for Oconto county: SAMUEL D. HASTINGS, Circuit Judge. *Affirmed.*

The appeal is from a judgment ousting the appellant from the office of county judge of Oconto county.

For the appellant there was a brief by *Greene, Fairchild, North & Parker,* and oral argument by *J. R. North.* They contended, *inter alia,* that the offices of county judge and justice of the peace are not incompatible. *State ex rel. Barnhill v. Thompson,* 122 N. C. 493, 29 S. E. 720; *State ex rel. Walker v. Bus,* 135 Mo. 325, 33 L. R. A. 616, 620; *Opinion of Justices,* 3 Me. 484; *Bamford v. Melvin,* 7 Me. 14; *State ex rel. Murphy v. Townsend,* 72 Ark. 180. The offices must subordinate, one with the other, and they must, *per se,* have the right to interfere, one with the other, before they are incompatible. *Att'y Gen. v. Detroit,* 112 Mich. 145; *State ex rel. Walker v. Bus,* 135 Mo. 325, 33 L. R. A. 616, 620; *State ex rel. Metcalf v. Goff,* 15 R. I. 505, 2 Am. St. Rep. 921; *State ex rel. Clawson v. Thompson,* 20 N. J. Law, 689; *Bryan v. Cattell,* 15 Iowa, 538; *State ex rel. Murphy v. Townsend,* 72 Ark. 180; Mechem, Pub. Off. §§ 422, 424. The question does not depend on a mere technical conflict. The conflict must be such that, on grounds of public policy, the offices ought not to be held by the same person. *State ex rel. Walker v. Bus,* 135 Mo. 325, 33 L. R. A. 616; *Abry v. Gray,* 58 Kan. 148, 48 Pac. 577; *Att'y Gen. v. Detroit,* 112 Mich. 145, 168.

For the respondent there was a brief by the *Attorney General,* and *McGee & Jeger,* of counsel, and oral argument by *C. A. A. McGee, L. M. Jeger,* and *A. C. Titus,* assistant attorney general.

TIMLIN, J. This action was begun October 12, 1905, and was tried upon an agreed statement of facts establishing that on April 2, 1901, the appellant was elected county judge of Oconto county, qualified, and entered upon the discharge of the duties of that office January 6, 1902. While holding said office and on April 4, 1905, he was elected to the office of justice of the peace in the city of Oconto in said county, and accepted the latter office and entered upon the discharge of its

duties on May 1, 1905. Appellant was re-elected county judge on April 4, 1905, for the term beginning on the first Monday of January, 1906, and on October 18, 1905, qualified for the office last mentioned for the term last mentioned. There are six qualified and acting court commissioners in Oconto county. The term of office of the county judge is four years. Sec. 2441, Stats. 1898. The learned circuit judge in his opinion filed in the case mentioned the instances of *habeas corpus* in which a county judge might be called upon to review the validity of a commitment by a justice of the peace and the statutory power of the county judge to compel the delivery of books and papers by officers to their successors which might be invoked against a justice of the peace. He rested his decision mainly on *State ex rel. Knox v. Hadley,* 7 Wis. 700, and *Milward v. Thatcher,* 2 Term Rep. 81, 7 Eng. Rul. Cas. 320, as there interpreted and applied. In *Milward v. Thatcher, supra,* the action was brought to try the right of the plaintiff therein to have the office of town clerk to which he had been last elected and which was filled by the defendant, who claimed the right to hold for life. The jury having found against the right of the defendant to hold for life, it became unnecessary to decide whether or not the office of jurat held by the plaintiff was incompatible with the office of town clerk to which he was last elected and which he was seeking to hold, because, as stated in the decision, the question of incompatibility of duties would not affect his right to hold the office which he last accepted. But in reply to the argument of counsel that there was in the borough a sufficient number of jurats to hold court without the plaintiff, ASHHURST, J., said:

"There may be cases in which it would be absolutely necessary for him to sit in that character, as in case of the sickness of the other members; and if there be one possible case in which he might be called upon to act, that is an answer to the argument."

In his separate opinion there is a like *dictum* by BULLER, J.:

"If the king by his charter say there shall be a mayor, twenty-four jurats, and a town clerk, the corporation cannot by their own act reduce the number by consolidating two of these offices."

In *State ex rel. Knox v. Hadley, supra,* these *dicta* seem to have become the basis of the decision. The relator in a contest by *quo warranto* for the office of police justice of the city of Watertown was held to have no right to that office, because at the time he was holding the office of justice of the peace in the same city. The court said:

"We consider that the two offices are clearly incompatible with each other, and that one person cannot and should not hold both of them at the same time. In the plainest terms the charter gives the city four judicial officers of the grade of justice of the peace, while, if the relator could make good his right to the office of police justice, it would in fact have but three."

This is a strong and authoritative declaration of public policy. It is said elsewhere that the incompatibility "which shall operate to vacate the first office exists where the nature and duties of the two offices are such as to render it improper from considerations of public policy for one person to retain both." Mechem, Pub. Off. § 422 and cases. Preliminary examinations in criminal cases may be held before a justice of the peace, county judge, or court commissioner. Ch. 195, Stats. 1898. The consolidation in one person of the offices of county judge and justice of the peace diminishes the number of examining magistrates by one. There is some conflict in the instances mentioned by the learned circuit court between the duties of county judge and those of justice of the peace. It was not an essential element of incompatibility at common law that the clash of duty should exist in all or in the greater part of the official functions. If one office was superior to the other in some of its principal or important duties so that the

exercise of such duties might conflict, to the public detriment, with the exercise of other important duties in the subordinate office, then the offices are incompatible. *State ex rel. Metcalf v. Goff,* 15 R. I. 505, 9 Atl. 226; *State v. Buttz,* 9 S. C. 156; *Rex v. Tizzard,* 9 B. & C. 418; *People ex rel. Ryan v. Green,* 58 N. Y. 295; *State ex rel. Walker v. Bus,* 135 Mo. 325, 36 S. W. 636. The decision of this case is, however, based upon *State ex rel. Knox v. Hadley, supra,* by which we consider ourselves bound under the rule *stare decisis.*

We do not understand that the term of the appellant which was to begin in January, 1906, is affected by the judgment appealed from.

By the Court.—The judgment of the circuit court is affirmed.

HOFER, Plaintiff in error, vs. THE STATE, Defendant in error.

January 12—January 29, 1907.

Criminal law: Fornication: Evidence.

As a rule of law there is no legitimate basis for a conviction in a prosecution of a man for fornication, if he unequivocally denies the charge; there is nothing suggestive to the contrary in the mere meeting of the parties under the circumstances; there is neither any direct evidence of the main fact nor direct corroborating evidence of the female as to circumstances bearing thereon, and her evidence as to such circumstances may be regarded as self-destructive by reason of wilful false swearing at material points.

[Syllabus by MARSHALL, J.]

ERROR to review a judgment of the circuit court for La Crosse county: J. J. FRUIT, Circuit Judge. *Reversed.*

Error to review a conviction of the offense of fornication with a sane female of previous chaste character under the age of eighteen years.

It was claimed by the prosecution that the alleged offense was in fact committed at the home of the plaintiff in error. The companion of the alleged guilty party was a girl seventeen years of age. Such party was a Catholic priest in charge of the congregation to which the people belonged with whom the girl resided. At the request of the plaintiff in error, November 1, 1904, the girl visited him for the ostensible purpose of receiving religious instruction. She was received into his private study. There was a bedroom adjacent thereto. She testified that when she was so received, plaintiff in error locked the door; that he proceeded to ask her some questions, and soon thereafter gave her a powder, making some suggestions which induced her to take the same on her tongue; that she soon thereafter became unconscious; that after a time she regained consciousness, when she found herself sitting in the chair, as before, with the priest beside her; that she was somewhat dizzy; that he handed her the catechism, and soon opened the door for her to depart, admonishing her not to tell what had occurred, for if she did she would lose her religion; that she promised not to tell; and that while on her way home she was conscious of a new sensation, indicating that something wrong had occurred. She testified to having visited the house of plaintiff in error, and been received and treated as before, on five subsequent occasions, and thereafter received from time to time and not so treated, and that on March, 1905, she was baptized and received into the church. She further testified that on each of the six visits she first made she experienced on her way home the sensation before referred to, and that on the last of such visits she discovered that her clothes were disarranged, and that there were other indications of her having been abused. About nine months after the first of such visits she gave birth to a child. Her condition was discovered about two months prior thereto, whereupon plaintiff in error was induced to visit the place where she resided, and was then by the man of the house accused

of having been the means of her condition. He became, thereupon, greatly excited, vigorously denied the accusation, and demanded of the girl if she would face him and claim that any such thing had occurred as had been suggested. Whereupon she said that she knew what he had done. A few days thereafter he left the country. Later a warrant was sworn out for his arrest, and he was found at the home of a Catholic brotherhood in the vicinity of Dubuque, Iowa. At the time of his arrest he said to the officer that there was no need of reading the warrant to him, as he knew what it was about. He claimed to have been sent into retirement at the home of the brotherhood by his bishop. There was evidence on his part that the story of the girl as to his having given her powders which rendered her unconscious was untrue; that her visits to him were not characterized by the privacy indicated by her testimony; that he locked the outside door only to prevent its blowing open; that there was a door opening from his study to parts of the house frequented by the housekeeper, so that she had full opportunity, at any time, to observe occurrences in the study, and that several persons came into the study while the girl was there. There was further evidence that at about the time of the girl's visits to plaintiff in error, young men were paying her attentions. That on one occasion, on a Sunday, she attended a dance, which occurred in a hall over a saloon, and late at night after the dance walked a long distance to her home with her young man attendant. Several exceptions were saved to instructions given by the court and refusals to instruct.

For the plaintiff in error there was a brief by *Doherty & Baldwin*, and oral argument by *John F. Doherty*.

For the defendant in error there were briefs by the *Attorney General* and *J. E. Messerschmidt*, state law examiner, and oral argument by *Mr. Messerschmidt* and *Mr. Otto Bosshard*.

MARSHALL, J. Several exceptions of minor importance, as we view them, were saved to instructions given to the jury and now presented for consideration. They are not wholly without merit, therefore it seems best to discuss them in detail so that the difficulties they present may not appear in case of another trial of the cause.

Though iterating and reiterating that the accused was entitled to the full benefit of a legal presumption of innocence and could not properly be convicted unless the evidence established his guilt beyond a reasonable doubt, the learned trial court said to the jury:

"All that the law requires is that the jury shall be satisfied beyond a reasonable doubt, and it is for the jury to determine, under all the evidence, what constitutes a reasonable doubt in their minds." "The court submits the whole case to you upon all the evidence, and leaves it for you to say whether you believe the truth to be established beyond a reasonable doubt."

The expression is quite novel that *"It is for the jury to determine what constitutes a reasonable doubt in their minds."* It is probably true in the abstract that it is for the jury in any instance to determine what constitutes the conclusion *"in their minds"* on any branch of the case. The conclusion *"in their minds"* is the one that must govern. No one can form their conclusions for them. It was for the jury here to determine, after such explanation as the court afforded them, what constituted a reasonable doubt *"in their minds."* They, themselves, necessarily had to arrive at their own mental concepts. However the expression under consideration is not to be commended. Standing alone it might be fatally erroneous, though under the circumstances it does not seem reasonably probable that the fairly clear instruction on the subject of reasonable doubt and the frequent admonitions given that the accused was entitled to an acquittal unless his guilt was established to the satisfaction of the jury beyond a reasonable doubt, were thereby materially weakened. Yet the uncertainty of meaning which may possibly have been misleading

cannot be entirely overlooked when viewed in connection with other matters bearing on the question of whether the accused was given a fair trial.

The other expression quoted is by no means entirely clear. *"The court submits the whole case to you upon all the evidence, and leaves it for you to say whether you believe the truth to be established beyond a reasonable doubt."* Was that suggestive, reasonably, that the real truth of the matter was clear enough, but it was for the jury to determine whether they believed it to be established by the evidence produced beyond a reasonable doubt. If so, it was highly prejudicial. We do not think the learned court intended any such thing. The jury were told, as before indicated, most distinctly:

"The law presumes the defendant innocent until the state has satisfied you, beyond a reasonable doubt, of the guilt of the offense with which he is charged. That presumption of innocence attends or goes with the defendant throughout the trial up to the time that you have arrived upon your verdict."

The whole case, from first to last, proceeded upon the theory of a judicial search for the unknown, but perhaps not undiscoverable. That the jury may have thought, from what the court said at the conclusion of the cause, that they were to determine whether the truth was established beyond a reasonable doubt, instead of determine the truth of the charge beyond a reasonable doubt, or that the truth as to the innocence of the accused was required to be established beyond a reasonable doubt before he could be acquitted, instead of that he was entitled to his acquittal unless the charge was established as true beyond a reasonable doubt, is so contrary to the instruction as a whole as to be unworthy of adoption. The learned court, probably inadvertently, left out after the word "truth" the words "of the charge," or he used such words and the reporter failed to put them down. We pass the faulty instruction as, under the circumstances, not by itself prejudicial, though it were far better not to have given it.

A question is presented of whether the court erred in instructing the jury to the effect that they were not necessarily precluded from convicting the accused by rejecting the powder story; in other words, that, notwithstanding the false powder story, it was open to them to inquire on the whole case whether the criminal act charged occurred under ordinary conditions. That is involved in the question of whether the evidence, in any reasonable aspect of it, was sufficient to warrant a conviction and need not be considered apart therefrom.

Complaint is made because the court instructed the jury that:

"Evidence does not consist alone in what is stated by the witnesses. There are circumstances that come out in every case sometimes by showing the surroundings that are cogent and forcible in themselves, and it is a circumstance for you to consider in this case that about nine months from the time it is alleged that this took place that a child was born to this woman. The child being born does not, of course, necessarily mean, by any means, that it is necessary to find that the defendant was the father of the child."

The learned judge, doubtless, intended this: In the trial of cases evidentiary circumstances are commonly established which are of significant probative force in themselves, such as the circumstance in the instant case of a child having been born to the woman in about nine months after the alleged commission of the offense, though, of course, such circumstance does not necessarily indicate that the accused is guilty. We discover no error in that. True, circumstances are often established on a trial which are in themselves very persuasive as to the truth of the whole or some essential element in the case. The circumstance of the birth of the child in the particular instance is such a circumstance. It is one of those supremely persuasive circumstances which cannot speak falsely. One of the essentials to a conviction was that some one had carnal knowledge of the body of the girl. The jury did not

need to be told of that. The significant, indisputable fact that she gave birth to a child established that beyond peradventure. Another essential was that the act resulting in the birth of the child occurred at the time of the girl's visits to the accused. The circumstances that the child was a full-time offspring, and that the period commencing with such visits and ending with the birth was about the ordinary period of gestation, were also highly important since it was necessary that those features should be consistent with the theory of guilt and be inconsistent with any reasonable theory of innocence. Ordinarily the evidentiary weight of circumstances is wholly a matter for the jury; but when a fact is established with such certainty as not to permit of any reasonable doubt on the question and that fact leads irresistibly to another, it is proper to instruct the jury accordingly. *Cupps v. State,* 120 Wis. 504, 522, 97 N. W. 210, 98 N. W. 546.

Further complaint is made of this instruction:

"This case is important. It is important on both sides. It is very important to the defendant that he should not be convicted unless the evidence satisfies you beyond a reasonable doubt of his guilt. It is also important on the other side that the virtue of womanhood shall be protected by those thrown in a position of confidence and trust such as appears by the evidence to have been the case here, that is the relation of pupil, as it were, to a pastor or priest—one receiving at the time religious instruction,—and it is important that you consider all the facts and circumstances, but at the same time the defendant should not be convicted unless the evidence satisfies you, beyond a reasonable doubt, of his guilt."

What the learned judge doubtless meant and the jury understood by that is this: It is important to the public that womankind should be protected from dangers growing out of those relations of trust and confidence such as are common and necessary between the head of a church and the members and prospective members of his flock. We perceive no error in that. We do not agree with counsel that the charge was

prejudicially suggestive, in that it singled out the relation of a priest to one confidingly trusting in him for religious instruction; nothing of the kind. The purpose, manifestly, was to stimulate the jury to a high appreciation of their duty to discover, if practicable, the real truth of the matter in controversy, bearing in mind at every step that the scales should not be allowed to turn unfavorably to the accused, unless weighed down on that side by evidence so convincing as to exclude every reasonable doubt of guilt. Such admonitions, to the end that the jurors may more certainly discharge their part in important cases, having due regard for the great interests involved, are none too frequent. Jurors may well be stimulated by the judicial head to perform their duties considerately and fearlessly by holding up to their view the public interests and those of the accused as well, coupled with language, as in this case, making prominent the degree of certainty of guilt required to warrant a conviction. *Schwantes v. State,* 127 Wis. 160, 106 N. W. 237.

Error is assigned because the court refused to instruct the jury to the effect that they could not properly convict the accused and at the same time disbelieve the powder story. That is involved in the question of whether the evidence warranted a conviction and will not be separately considered.

Numerous exceptions were preserved to remarks of counsel for the state in addressing the jury, mostly predicated on the idea that they could not legitimately disbelieve the powder story and at the same time believe with the certainty required to warrant a conviction that the accused committed the act charged, which need not be separately discussed in view of the foregoing.

Complaint is made because the state's attorney said to the jury: "You will say whether intercourse did take place, as I believe in my judgment it did." That manner of address is not to be commended; and yet it is not to be condemned as harmful error, where the idea conveyed is, as it seems was

the case here, that the evidence convinces the speaker, as he believes it should the jury, of the guilt of the accused. The better way by far is to confine the address to fair efforts to produce that belief in the minds of the jurors which in the judgment of the speaker the evidence warrants, without expressing any opinion thereon as such. As was said here on another occasion, counsel for the state have a right to assume, fairly, that the evidence produced on the part of the state is true; that it establishes what it tends to establish, and that it points convincingly to the guilt of the accused, the jury being properly instructed that they are the sole judges in the matter, as they were in this case. *Fertig v. State,* 100 Wis. 301, 307, 75 N. W. 960.

Lastly, counsel for the state spoke of the child's hair being darker than the hair of children ordinarily of its age. The jury were immediately directed to disregard the suggestion and the attorney was admonished, emphatically, that his remark was improper. It seems that the child had been in court during the trial, where the jurors were afforded full opportunity to observe it, and acquire such impressions as its resemblance to the accused, if any, might create; though there was no attempt to exhibit it in evidence. In *Hanawalt v. State,* 64 Wis. 84, 24 N. W. 489, such remarks as those in question were held not harmful error when based merely on the presence of the child in court, the jury being promptly instructed to disregard them.

The dominant feature of the argument of counsel for plaintiff in error is that the evidence was not sufficient in any reasonable view of it to warrant a conviction; that there being no direct evidence of the main fact and that of the girl as to her condition at the time of the alleged intercourse being as a matter of law, as the jury were instructed, wilfully false, and there being no corroboration of her evidence as to circumstances existing immediately after the alleged criminal act, which if they existed, in fact, would be incriminating; in

other words, since the case on the part of the state as to the main fact rested wholly on uncorroborated evidence of the girl as to mere incriminating circumstances, in connection with the manifestly false story about her having been given a powder and immediately becoming unconscious and the accused having had intercourse with her while she was in that condition, if at all, in view of the established facts as to her association with others whereby her pregnancy could well be accounted for consistent with the innocence of the accused, and in view of his positive and unequivocal denial of the alleged criminal act,—there was not, as a matter of law, any legitimate basis for the verdict of guilty. In that counsel plant the case of the accused at this point on this as a principle: In prosecutions of this sort, there being nothing suggesting criminality in the mere meeting of the parties, the person charged should not, in the face of his unequivocal denial of the charge, be convicted in the absence of any direct evidence to the contrary as to the act of intercourse, or indirect evidence, except the uncorroborated testimony of the female as to incriminating circumstances in connection with her manifestly wilfully false statements strongly tending to destroy her credibility.

After a very careful consideration of the case we have reached the conclusion that the principle contended for, as above, is the law and that it rules this case in favor of plaintiff in error. In such a situation as this; one, especially, where the proof is undisputed that the woman's pregnancy might have been produced otherwise than by the act of the person accused, there is no sound basis for a finding that the incriminating circumstances are all established beyond a reasonable doubt and that with such degree of certainty are all consistent with the theory of guilt and inconsistent with every other reasonable theory, all of which is necessary to a conviction. *Schwantes v. State,* 127 Wis. 160, 106 N. W. 237; 4 Elliott, Ev. § 2709.

How could it be said within the boundaries of reason from such evidence as we have here that the accused is guilty to a moral certainty—the highest degree of certainty attainable in human affairs—which is necessary to warrant a conviction? The woman unquestionably swore falsely, and wilfully so, at the most material point in the case in telling the ridiculous powder story. In view of that, is she to be believed so as to exclude every reasonable theory of innocence, she having associated with others than the accused who might have produced her condition? The jury might well, on account of her wilfully false evidence, have rejected all her testimony where not corroborated by some credible evidence, even if the accused had kept silent. The case is peculiar, in that no one testified that the act of intercourse alleged occurred, and no one directly or indirectly corroborated the evidence of the girl as to any incriminating circumstances happening at the time of the alleged wrongful act, and her evidence may be regarded as self-destructive.

The case, as claimed by counsel for the accused, falls clearly within the principle laid down in *O'Boyle v. State,* 100 Wis. 296, 300, 75 N. W. 989. True that was a case where the charge was rape, but it is considered that the principle declared is applicable as well to a case of this sort under the circumstances presented. The court there said:

"Where the evidence of the prosecuting witness bears upon its face evidence of unreliability, to sustain a conviction there should be corroboration by other evidence as to the principal facts relied on to constitute the crime."

Maxfield v. State, 54 Neb. 44, 74 N. W. 401, was cited, where the court held that in case the evidence of the woman as to the main fact is so unreliable as to be self-destructive in respect thereto, there should be some reasonable corroboration of her evidence as to the main fact to warrant a conviction. The same rule was applied in *Smith v. State,* 23 Ga. 297, cited to our attention by counsel for plaintiff in error.

Counsel for the state answered the argument of counsel for the accused regarding there being no evidence corroborating the girl as to the main fact by pointing to the circumstances that the girl unquestionably visited the accused at the time she claimed to have done so; that a child was born to her in about the ordinary period of gestation thereafter, and that the accused left the state and retired to a religious institution of his order in a sister state soon after he knew that he was suspected of being the guilty party. Her pregnancy merely evidenced that a crime was committed by some one. The birth of the child at a time rendering it probable that the offense occurred about the date of her visits to the accused did not corroborate her as to any incident she testified to pointing to criminality. The same is true as to the circumstance of the accused leaving the state. The fact that the girl visited the accused in private was mere proof of opportunity, not of the main fact or of any circumstance evidentiary thereof.

The learned assistant attorney general, while joining with the learned district attorney in adhering to the theory upon which the case was submitted to the jury, presented for consideration the theory that the girl was unconscious, as she testified, at the time it was claimed the criminal act occurred; that her condition was produced by hypnotism practiced by the accused, and that the trial court incorrectly charged the jury that her testimony was manifestly false. There was no evidence produced to support that, and we do not see our way to adopt or seriously consider it. The cause, as indicated, was submitted upon the theory that if the criminal act occurred the girl was conscious of and participated in it, and that her entire story as to having been made unconscious on the first six occasions of her visiting the accused was a fabrication. It is considered that the cause must stand or fall on such theory; that the conviction cannot be sustained upon one not presented to or considered by the jury and in respect to which there is no evidence, and at the best only conjecture.

We reach the conclusion that the judgment should be reversed because of insufficiency, as a matter of law, of the evidence to sustain it.

By the Court.—The judgment is reversed, and the cause is remanded for a new trial.

THE STATE EX REL. MCGOVERN, District Attorney, Appellant, vs. WILLIAMS, Circuit Judge, Respondent.

January 14—January 29, 1907.

Affirmance on equal division.

MANDAMUS to OREN T. WILLIAMS, Judge of the Circuit Court for Milwaukee County. *Dismissed.*

On March 20, 1906, the cause was argued on motion to quash the writ.

For the respondent, in support of the motion, there was a brief by *Hoyt, Doe, Umbreit & Olwell,* and oral argument by *A. C. Umbreit, J. B. Doe,* and *F. M. Hoyt.* They contended, *inter alia,* that the supreme court is without jurisdiction to issue the peremptory writ prayed for unless under and in accordance with an express statute. *Ex parte Burtis,* 103 U. S. 238; *U. S. v. Lawrence,* 3 Dall. 42; *U. S. v. Peters,* 5 Cranch, 115; *Life & F. Ins. Co. v. Wilson,* 8 Pet. 291; *Kendall v. U. S.* 12 Pet. 524; *Decatur v. Paulding,* 14 Pet. 497; *U. S. ex rel. Crawford v. Addison,* 22 How. 174; *Ex parte Milwaukee R. Co.* 5 Wall. 188; *Ex parte Newman,* 14 Wall. 152; *Ex parte Loring,* 94 U. S. 418; *Ex parte Flippin,* 94 U. S. 348; *Ex parte Brown,* 116 U. S. 401; *U. S. v. Sanges,* 144 U. S. 310; *State v. Jones,* 7 Ga. 422; *People v. Corning,* 2 N. Y. 9; *Comm. v. Reynolds,* 4 Hayw. 110; *Comm. v. Harrison,* 2 Va. Cas. 202; *State v. Burns,* 18 Fla. 185; *State v. Copeland,* 65 Mo. 497; *People v. Royal,* 2 Ill.

557. The alternative writ does not state facts sufficient to entitle the relator to any relief. The writ embodying the petition, and not the petition itself, is the complaint. *State ex rel. G. B. & M. R. Co. v. Jennings,* 56 Wis. 113; *Johnson v. Smith,* 64 Ind. 275; *Board of Comm'rs v. State ex rel. Lewis,* 61 Ind. 75, 81; *State ex rel. Cothren v. Lean,* 9 Wis. 279, 290; *Hambleton v. Dexter,* 89 Mo. 188, 190; *State ex rel. Hathaway v. Board of Health,* 103 Mo. 22; *Johnes v. Auditor,* 4 Ohio St. 493.

For the respondent there was also a brief by *Wheeler & Perry,* and oral argument by *Lyman G. Wheeler.* They contended, *inter alia,* that, even if the appellate court should direct the trial court to vacate the order in question, there was nevertheless no way for the trial court to lawfully bring the defendants again before it, as they had been discharged. *State ex rel. Gold v. Secrist,* 33 Minn. 381, 23 N. W. 545; *State v. Granville,* 45 Ohio St. 264; *People v. Stacy,* 34 Cal. 307.

For the relator there was a brief by the *Attorney General, A. C. Titus,* assistant attorney general, and by *Francis E. McGovern,* district attorney, and *Guy D. Goff,* assistant district attorney, of counsel, and oral argument by the *Attorney General, Mr. Titus,* and *Mr. McGovern.* They contended, *inter alia,* that the supreme court, under the constitution, has power to exercise superintending control over a circuit court at the request of the state, under proper circumstances, in a criminal case. The relief prayed for has been exercised in other states. The discharge of the defendants is not an acquittal, they have not been in jeopardy, and a writ of *mandamus* will lie. *Luton v. Circuit Judge,* 69 Mich. 610; *Grand Rapids v. Braudy,* 105 Mich. 670; *State ex rel. Bayha v. Philips,* 97 Mo. 331; *Swift v. Wayne Circuit Judges,* 64 Mich. 479; *People ex rel. Robison v. Swift,* 59 Mich. 529, 26 N. W. 694; *Louisell v. Benzie Circuit Judge,* 139 Mich. 40, 102 N. W. 371; *Clute v. Circuit Judge,* 139 Mich. 337, 102 N. W. 843; *Hill v. Morgan,* 9 Idaho, 718, 76 Pac. 323, 326; *State ex rel. Smith*

v. Smith, 69 Ohio St. 196, 68 N. E. 1044; *State ex rel. Shannon v. Hunter,* 3 Wash. 92; *State ex rel. Harris v. Laughlin,* 75 Mo. 358; *People ex rel. Coberly v. Scates,* 3 Scam. 351; *Crane v. Saginaw Circuit Judge,* 111 Mich. 496; *State ex rel. Keane v. Murphy,* 19 Nev. 89, 6 Pac. 840; *Queen v. Justices of Middlesex,* 2 Q. B. Div. 516; *Quimbo Appo v. People,* 20 N. Y. 531; *McCreary v. Rogers,* 35 Ark. 298, 301; *Comm. v. Balph,* 111 Pa. St. 365; *In re Parsons,* 150 U. S. 150; *In re Rice,* 155 U. S. 396; *Bob v. State,* 2 Yerg. 173; *State ex rel. New Orleans v. Judge of Civil Dist. Court,* 52 La. Ann. 1275; *Havemeyer v. Superior Court,* 84 Cal. 327; *Hensley v. Superior Court,* 111 Cal. 541; *Detroit v. Wayne Circuit Judge,* 79 Mich. 384, 44 N. W. 622; *People ex rel. P. H. & G. R. Co. v. Judge,* 31 Mich. 456; *Tawas & B. C. R. Co. v. Circuit Judge,* 44 Mich. 479; *Maclean v. Circuit Judge,* 52 Mich. 257; *E. T. Barnum W. & I. Works v. Speed,* 59 Mich. 272; *Van Norman v. Circuit Judge,* 45 Mich. 204; *Pennington v. Woolfolk,* 79 Ky. 13; *Benners v. State,* 124 Ala. 97; *Ex parte Barnes,* 84 Ala. 540; *Ex parte Haralson,* 75 Ala. 543; *State v. Hart,* 19 Utah, 438; *State ex rel. Fourth Nat. Bank v. Johnson,* 103 Wis. 591, 51 L. R. A. 33.

The cause was re-argued January 14, 1907.

For the respondent there was a brief by *Hoyt, Doe, Umbreit & Olwell,* and oral argument by *A. C. Umbreit, F. M. Hoyt,* and *J. B. Doe.* They contended, *inter alia,* that the overwhelming weight of authority is against the procedure here invoked. *State v. Agee,* 83 Ala. 110; *Strong v. Grant,* 99 Cal. 100; *Cariaga v. Dryden,* 29 Cal. 307; *People ex rel. Wheaton v. Weston,* 28 Cal. 639; *Lewis v. Barclay,* 35 Cal. 213; *People v. Sexton,* 37 Cal. 532; *Scott v. Superior Court,* 75 Cal. 114; *Wheley v. King,* 92 Cal. 431; *People ex rel. Gesford v. Superior Court,* 114 Cal. 466; *Kerr v. Superior Court,* 130 Cal. 183; *People ex rel. Sayer v. Garnett,* 130 Ill. 340; *Bailey v. Ewart,* 52 Iowa, 111; *State ex rel. v.*

Norton, 20 Kan. 506; *St. Louis & S. F. R. Co. v. Shinn,* 60 Kan. 111; *Blair v. McCann,* 23 Ky. Law Rep. 1226; *Cassidy v. Young,* 92 Ky. 227; *Wells v. Thomas,* 72 Md. 26; *Gray v. Bridge,* 11 Pick. 189; *Gibbs v. County Comm'rs,* 19 Pick. 298; *State ex rel. Treadway v. Wright,* 4 Nev. 119; *State ex rel. Combination Co. v. Curler,* 4 Nev. 445; *Nevada Cent. R. Co. v. District Court,* 21 Nev. 409; *State ex rel. O. S. Mfg. Co. v. Curler,* 26 Nev. 347; *Sinnickson v. Corwine,* 26 N. J. Law, 311; *State ex rel. Mooney v. Edwards,* 51 N. J. Law, 479; *Ex parte Ostrander,* 1 Denio, 679; *Ex parte Bassett,* 2 Cow. 458; *Ex parte Johnson,* 3 Cow. 371; *People ex rel. Legg v. Onondaga C. P.* 8 Wend. 509; *Hutchinson v. Comm'rs,* 25 Wend. 692; *People ex rel. Snow v. Cayuga C. P.* 10 Wend. 632; *People ex rel. Doughty v. Dutchess C. P.* 20 Wend. 658; *Weeden v. Town Council,* 9 R. I. 128; *Eubank v. Broughton,* 98 Va. 499; *Thurston v. Hudgins,* 93 Va. 780; *Roberts v. Paul,* 50 W. Va. 528; *Fleshman v. McWhorter,* 54 W. Va. 161; *State ex rel. Liggins v. Judges,* 47 La. Ann. 1516; *State ex rel. Hyatt v. Smith,* 105 Mo. 6; *State ex rel. South St. Joseph T. Co. v. Mosman,* 112 Mo. App. 540; *State ex rel. Att'y Gen. v. District Court,* 13 N. Dak. 211, 100 N. W. 248; *Ex parte Newman,* 14 Wall. 152; *In re Key,* 189 U. S. 84; *Am. C. Co. v. J., T. & K. W. R. Co.* 148 U. S. 372; *U. S. ex rel. Harless v. Judges,* 85 Fed. 177; *Ex parte Lewis,* 21 Q. B. Div. 191, 192; *Reg. v. Justices of Yorkshire* (*Ex parte Gill*), 53 L. T. Rep. 728; *Reg. v. Sheil,* 50 L. T. Rep. 590; *State v. Kemp,* 17 Wis. 669; *U. S. v. Salter,* 1 Pin. 278; *Milwaukee v. Weiss,* 93 Wis. 653; *Von Rueden v. State,* 96 Wis. 671, 676; *State ex rel. McCaslin v. Smith,* 65 Wis. 93; *State v. Grottkau,* 73 Wis. 589; *Wright v. Wright,* 74 Wis. 439; *State ex rel. Pfeiffer v. Taylor,* 19 Wis. 566; *In re Rice,* 155 U. S. 396.

For the relator there was a brief by the *Attorney General, A. C. Titus,* assistant attorney general, and *Francis E. McGovern,* district attorney, and oral argument by *Mr. McGov-*

ern and *Mr. Titus.* They contended, *inter alia,* that under the provisions of sec. 3, art. VII, Const., the supreme court has power to set aside the erroneous order of the circuit judge quashing the indictment and discharging the defendants, and to direct him to reinstate the case and proceed with the trial according to the usual practice of circuit courts in Wisconsin. *State ex rel. Fourth Nat. Bank v. Johnson,* 103 Wis. 591, 607; *State ex rel. Fourth Nat. Bank v. Johnson,* 105 Wis. 164, 176; *State ex rel. Spence v. Dick,* 103 Wis. 407, 409; *In re Pierce,* 44 Wis. 411, 442–444, 456; *Norris v. Clinkscales,* 47 S. C. 488, 25 S. E. 797; *Goodwin v. Prime,* 92 Me. 355, 42 Atl. 785, 787; *State v. Wood,* 23 N. J. Law, 560; *Osborn v. U. S. Bank,* 9 Wheat. 738, 966; *State v. Cummins,* 36 Mo. 263, 278; *State ex rel. Att'y Gen. v. Brunot,* 104 La. 237; *People ex rel. Hamilton v. Barnes,* 66 Cal. 594; *Camilo Temple v. Superior Court,* 70 Cal. 211; *Cahill v. Superior Court,* 145 Cal. 42, 46; *Ex parte Alabama,* 115 Ala. 123; *Ex parte Jones,* 133 Ala. 212; *State ex rel. Smith v. Pitts,* 139 Ala. 152; *State ex rel. Schutz v. Williams,* 127 Wis. 236, 106 N. W. 286. No principle of law or recognized rule of procedure will be violated, superseded, or infringed by making the writ absolute. 2 Andrews' Cooley's Blackstone, 1479, note; *Reg. v. Faderman,* 4 Cox Crim. Law Cas. 359; Whart. Crim. Pl. & Pr. (9th ed.) § 404; 1 Bishop, New Crim. Proc. § 784; *State v. Barrett,* 54 Ind. 434; *Thomas v. State,* 6 Mo. 457; *State v. Polk,* 91 N. C. 652; secs. 4609, 4612, 4639, 4645, Stats. 1898; *People v. Bringard,* 39 Mich. 22; *Queen v. Brown,* 7 El. & Bl. 757; *Queen v. Pilkington,* 2 El. & Bl. 546; *Queen v. Adamson,* 1 Q. B. Div. 201; *State ex rel. Fourth Nat. Bank v. Johnson,* 103 Wis. 591, 623; Merrill, Mandamus, § 40; *State ex rel. Buchanan v. Kellogg,* 95 Wis. 672; *State ex rel. Keane v. Murphy,* 19 Nev. 89, 6 Pac. 840; *Hill v. Morgan,* 9 Idaho, 718, 76 Pac. 323; *Board of Comm'rs v. Mayhew,* 5 Idaho, 572, 51 Pac. 411; *People ex rel. Hoise v. Wayne Circuit Judge,* 22 Mich. 493; *People ex rel. Robi-*

son v. Swift, 59 Mich. 529, 26 N. W. 694; *State ex rel. Shannon v. Hunter*, 3 Wash. 92, 27 Pac. 1076; *Ex parte Bradstreet*, 7 Pet. 634; *Parker, Petitioner*, 131 U. S. 221; *Harrington v. Holler*, 111 U. S. 796; *State ex rel. Durner v. Huegin*, 110 Wis. 189; *People v. Martin*, 1 Park. Crim. Rep. 187; sec. 7, art. I, Const.; *Rowan v. State*, 30 Wis. 129, 144; *In re Bergin*, 31 Wis. 383; *State ex rel. Milwaukee v. Newman*, 96 Wis. 258, 272, 273; *Schaeffer v. State*, 113 Wis. 595; *Douglass v. State*, 3 Wis. 820; *Brosde v. Sanderson*, 86 Wis. 368; *Terrell v. Superior Court*, 127 Cal. xviii, 60 Pac. 38; *Comm. v. Adams*, 92 Ky. 134, 17 S. W. 276.

PER CURIAM. This is an application for a peremptory writ of *mandamus* directed to Hon. ORREN T. WILLIAMS, one of the circuit judges of Milwaukee county. It appears by the relation and the alternative writ which was issued thereon that Frank Keogh and Otis T. Hare were indicted for obtaining a certain county order by false pretenses, and that Judge WILLIAMS sustained separate demurrers to the indictment on the part of both the defendants on the ground that no offense was stated therein and discharged the defendants. Thereupon application was made to this court to exercise its power of superintending control by way of *mandamus* compelling Judge WILLIAMS to vacate said orders and reinstate the action and proceed with the trial thereof. An alternative writ having issued out of this court, the respondent moved to quash the same on the grounds, first, that the court is without jurisdiction, and, second, that the facts stated are not sufficient to entitle the relator to a writ of *mandamus*. The matter was fully argued during the January term, 1906, and a re-argument ordered, which has now been had. The six justices who participated in the hearing of both arguments are equally divided in opinion as to whether a peremptory writ should issue, and this has been the situation since the first argument took place. It is very apparent that no affirmative action in the matter

can be taken, and that any further attempt in that direction would be a mere waste of time. In this situation it seems that the only action that can be taken is to dismiss the proceedings.

By the Court.—Proceedings dismissed, without costs.

TIMLIN, J., took no part.

FIGGE, Respondent, vs. BERGENTHAL and others, Appellants.

October 10, 1906—February 19, 1907.

Corporations: Officers: Fraud: Borrowing on credit of corporation: Duty of officers to corporation: Sales to corporation by officers: Power of courts to regulate corporate affairs: Actions by stockholders: Injunctions: Limitation of actions: Concurrent remedy at law or in equity: Mutual open accounts current: Accrual of cause of action: Appeal and error: Weight of findings of trial court: Findings, when disturbed: Salaries of corporate officers.

1. A corporation, by its president and manager, executed and delivered to a bank its note and received credit on the books of the bank for the face of the note, the amount being immediately checked out by the corporation, acting through such president and manager, for the use of his wife, who was the controlling stockholder. The wife subsequently paid the note and all interest thereon in full. By improper bookkeeping, and without evidence of otherwise attempting concealment from any one, the transaction did not appear on the corporation's books, but the note was considered as the wife's obligation, and the result was the same as though she had been charged therewith and paid it, with interest thereon, to the corporation, to be by it turned over to the payee. *Held*, that the corporation was not injured by the improper bookkeeping or by the loan of its credit by being a party to the note.
2. In such case the corporation was not entitled to interest from the wife.
3. In such case a finding that this and other transactions, stated in the opinion, were fraudulent is *held* unsupported by the evidence.

4. While officers of a corporation, because of their fiduciary relation to the corporation, owe the highest good faith, diligence, and endeavors to promote the corporate interests, they are not prohibited from selling their property to the corporation, provided the transaction is open and fair.

5. Where an officer, holding a majority of the stock of a corporation, sold to it a commodity in which it dealt, the transaction being entered on the books of the corporation and known to the stockholders, and the corporation bought at a fair market value, such transaction, although carried out through the officer in disposing of his own property to the corporation, is *held* valid and subject to no inference of fraud.

6. In such case an objecting stockholder was promised by the officer that he would take the commodity off the hands of the corporation, but nothing was done for seven years. During such time the corporation was buying the same commodity from other parties, and, in the instant purchase, was simply pursuing its customary business policy. The management of the corporation evidently regarded the purchase from the officer as good business policy, and there was no evidence to show that it was not fair and open and upon as fair terms as purchases of like commodities from other persons. *Held*, if any mistake was made which worked injury to the corporation, that it resulted from error of judgment and not from any fraud on the part of the officer.

7. In the absence of fraud courts cannot engage in regulating the conduct of the business of corporations against the wishes of a majority of the directors and stockholders, so long as the corporation is acting within the scope of its powers.

8. Plaintiff, at the time he bought shares in a corporation, entered into an agreement with the president and secretary, who together held the majority of all the stock, that they would pay him a certain percentage on his interest in the corporation until such time as the president's salary should be reduced one half. Thereafter for some fourteen years all the stockholders, including plaintiff, annually voted to fix the salary of the president at its original sum, but the president and secretary failed to keep their agreement to pay plaintiff the agreed percentage. *Held*, that a claim for such unpaid percentage could not be determined in an action brought under secs. 3237–3239, Stats. 1898, since such claim, if not void as against public policy, was a personal and not a corporate claim, and not one contemplated or authorized by such statute.

9. Neither could plaintiff be heard in a court of equity, as an innocent stockholder, on behalf of the corporation in an action

to reduce such salary because of a personal grievance of his own.

10. Defendant stockholders and officers in control of a corporation executed personally two notes, receiving the proceeds of one, the proceeds of the other being received by the corporation and credited on the books. Individual property was delivered as collateral to one note and corporate property as collateral to the other. The collateral agreement contained a provision that the collateral was deposited as collateral "for the payment of this or any other direct or indirect liability or liabilities of ours to said bank, due or to become due." The making, in this way, of corporate property collateral to the individual indebtedness was evidently an unconscious error, and was promptly corrected by the bank when discovered. There was no evidence to indicate that the defendants threatened to use the corporation's credit fraudulently or to its injury. *Held*, that an injunction restraining defendants from using the credit or property of the corporation on private account should not have been awarded.

11. Under subd. 7, sec. 4222, Stats. 1898, where the remedy at law and that in equity are concurrent upon the same state of facts, the action in equity is barred, irrespective of the discovery of the facts constituting the fraud, when the action at law is barred.

12. In an action brought under the provisions of secs. 3237–3239, Stats. 1898, based on alleged fraud of the managing officers of a corporation, it was established that the directors and at least a majority of the stockholders, including the plaintiff, knew of the alleged fraud seven years before the action was commenced. *Held*, that the action was barred under the provisions of subd. 7, sec. 4222, Stats. 1898.

13. In such case the accrual of the right of action did not depend on a prior demand and refusal.

14. In such case the cause of action was *held* not to be based on any right to enforce a contract obligation against the corporate officers, but upon fraud, and hence, although the defendant officers had a mutual open account current with the corporation, the provisions of sec. 4226, Stats. 1898 (providing that the cause of action on such account shall be deemed to have accrued at the time of the last item proved), did not prevent the bar of sec. 4222.

15. Where there is not sufficient evidence to sustain a finding that a stock of merchandise of a corporation was carried fraudulently or for an unlawful purpose, but, on the contrary, there was ample evidence to support a finding that it was good busi-

ness policy to pursue the course adopted, the situation does not warrant a court in interfering with the business of the corporation by ordering a reduction of such stock.

16. In an action under secs. 3237–3239, Stats. 1898, where no cause of action was found to exist against the individual defendant officers, it is not improper or unjust for the corporation to bear the expense of defending the action.

17. Conclusions of law, or such in effect, found in the trial court's decision as conclusions of fact, and conclusions of fact reached by wrong application of legal principles, do not fall within the rule that the findings of the trial court should not be disturbed unless against the preponderance of the evidence.

18. Such rule has no application when the trial court has found the facts of the case and followed such findings with conclusions that the transactions involved were fraudulent, harmful, and void, and the appellate court reverses such conclusions.

19. A business transaction between a corporation and one of its officers, whereby the latter sells to or buys from the former, is not absolutely void, or even voidable, under all circumstances, and is not to be classed with the transaction of an administrator, executor, or guardian who buys property belonging to the trust estate.

20. In such case, however, the acts of the officer should be carefully scrutinized, and if it appears that the object of his dealing was for the purpose of gain to himself and loss to the corporation, or the dealing was rendered harmful to the corporation merely because the transaction was with the officer instead of an outside party, the transaction should not be upheld if seasonably questioned.

21. Where a balance in a mutual account current between parties is stated, the six-year statute of limitations commences to run as to all transactions included in the account up to that time.

22. An officer of a corporation while acting as a director cannot fix his own salary so as to bind the corporation in an action by it or by a nonconsenting stockholder in its name challenging the validity of the salary.

23. In such case, however, where the stockholders ratify the salary so fixed, the act becomes binding on the corporation and all stockholders.

24. In an action under secs. 3237–3239, Stats. 1898, it appeared that plaintiff had agreed to the salary paid the defendant officers of a corporation, but under a promise that he (plaintiff) should receive a consideration. *Held*, that plaintiff could not be heard in a court of equity, either in his own behalf or that of the corporation, to challenge such salary, at least up to the time of a rescission.

APPEAL from a judgment of the circuit court for Milwaukee county: WARREN D. TARRANT, Circuit Judge. *Reversed.*

This is an appeal from an interlocutory judgment of the circuit court for Milwaukee county. The case was commenced October 10, 1902, by the respondent, vice-president and director of the *William Bergenthal Company,* under secs. 3237–3239, Stats. 1898. The issues involved appear by the findings of fact. The court found as facts, substantially:

(1) That in April, 1879, the *William Bergenthal Company* was incorporated under the laws of Wisconsin, with a board of three directors, and a capital stock of $100,000, divided into 1,000 shares of $100 each, and was authorized to carry on the business of distilling, redistilling, and rectifying alcoholic spirits, and of wholesale and retail liquor business in Milwaukee and elsewhere.

(2) Defendants *William* and *Anna M. Bergenthal* are husband and wife, and at all times after March 26, 1888, *Anna M. Bergenthal* owned 504 shares and *William* one share of stock, and were two of the three directors. *William Bergenthal* was president and treasurer and *Anna M. Bergenthal* secretary of the *William Bergenthal Company. Anna M. Bergenthal* took no active part in the business, but *William,* by virtue of holding a majority of the board of directors and the principal offices, at all times directed and dominated the business policy.

(3) March 26, 1888, plaintiff purchased from *Anna M. Bergenthal* 159 shares of the capital stock of the *William Bergenthal Company* for $17,490, paying $1,590 down and executing to *Anna M. Bergenthal* four notes of $3,975 each, with interest at six per cent., payable annually, running two, three, four, and five years respectively. Plaintiff also deposited the 159 shares of stock as collateral security for the payment of interest and principal on these notes under an agreement that the dividends upon the stock should be applied first to interest due upon said notes, the earliest maturing notes first, and then to the principal in the same order, and as each

note was fully paid a proportionate amount of stock should be released to the plaintiff, but until surrendered *Anna M. Bergenthal* should have the right to vote upon said stock at all meetings of the stockholders.

(4) On or about February 16, 1889, the *William Bergenthal Company* held the note of one William F. Bergenthal, one of its stockholders, for $5,000, and other retiring stockholders held notes of said corporation for $15,768, and said William F. Bergenthal owed the corporation $20,768 and had 176 shares of the capital stock of the corporation pledged as collateral security to said debt. Plaintiff about this time purchased fifty-nine additional shares out of said 176 shares, and agreed to pay said corporation therefor, which together with one other share held in his name gave him sixty shares of the capital stock of the corporation fully paid, and said plaintiff was, at the time of the commencement of this action, and since March 26, 1888, the other director and vice-president of the corporation, and held one share of stock absolutely and the equity in 159 shares and the equity in said sixty shares up to the time of payment, which was the 26th day of January, 1903, in all 219 shares of the par value of $21,900, but really of much greater value on account of the large surplus hereinafter mentioned. That plaintiff was engaged during all this time as a traveling salesman for the corporation on a salary and spent most of his time on the road traveling in Wisconsin, Michigan, and parts of Illinois selling liquors to retail dealers, and, although attending directors' and stockholders' meetings and to some extent at the taking of annual inventory, was not familiar with the business transactions of the corporation in detail or with its books of account.

(5) June 16, 1888, plaintiff and defendants *William* and *Anna M. Bergenthal* entered into the following agreement:

"Milwaukee, June 16, 1888.

"I hereby agree to give *Henry Figge* three and one-half per cent. credit as his interest may appear in the *William Bergenthal Co.* for interest on notes given to *Anna M. Bergen-*

thal upon March 26, 1888, until the time I shall reduce my salary from six thousand to three thousand dollars as officer of the *William Bergenthal Co.*

"WILLIAM BERGENTHAL.

"I accept the above agreement.

"ANNA M. BERGENTHAL.

"In witness of Emilia Pickrnton."

After March 26, 1888, the defendant corporation, through its directors *William* and *Anna M. Bergenthal,* and with the consent of plaintiff, carried on the collection of the principal and interest on the indebtedness of plaintiff on the contracts of March 26, 1888, June 16, 1888, and February 16, 1889, by crediting certain dividends and other accounts of plaintiff with said corporation to plaintiff on the books of the corporation and debiting him with moneys paid by said corporation on said notes, and plaintiff was credited with a portion of said three and one-half per cent. under the contract of June 16, 1888, and the parties to said contract of June 16, 1888, understood that the three and one-half per cent. should be computed on the face value of the plaintiff's stock, $21,900, and entered credits to him accordingly.

(6) The principal trade of defendant corporation was in whiskies in barrels. Whiskies after being distilled are delivered to the United States and by it inspected, gauged, and put into bonded warehouses, and warehouse receipts issued to the distiller, which are known as United States bonded warehouse receipts, and the whisky represented thereby is bought and sold by indorsement and transfer of such receipts. All whisky lawfully on the market must have originally come from some bonded warehouse of the United States. The first market value of new distilled whisky is from twenty to fifty cents per gallon, and the gallon tax of the United States thereon is $1.10 per gallon, based upon the number of gallons shown by the gauge made by the United States at the time of reception into the warehouse, less estimated allowance for shrinkage up to seven years. The gallon tax and other charges must be paid before the whisky can be removed from the

United States warehouse. Since 1894 whiskies cannot be left in United States warehouses longer than eight years, and at the end of that time must be taken out and the gallon tax and other charges paid, unless the whisky is intended for exportation to foreign countries, in which case it must be taken out at the end of eight years, but the gallon tax need not be paid. On whisky imported into the United States which was previously exported there is a customs duty of $1.10 per gallon. Prior to 1894, when the bonded warehouse period was three years, a custom sprang up of exporting American-made whiskies to Europe just before expiration of permissible bonded warehouse period, and storing them in European warehouses, not with the intention of selling in Europe, but of importing back to the United States when the owner would be able to pay the gallon tax thereon, thus postponing the time of payment to the United States of the gallon tax, and this practice has continued after the bonded warehouse period was extended to eight years, but the practice has fallen off and is unprofitable where whiskies have remained a long time in Europe. Whisky in barrels shrinks in quantity, and this adds to cost of carrying it but improves its quality. After eight years improvement in value or quality is not equal to loss in quantity and cost of carrying. Old whiskies are very costly by reason of losses of shrinkage, storage, investment in taxes, and other expenses, and the market therefor is limited compared with the market for newer whiskies. Old whiskies are liable to be lost by accidental leakage or rendered worthless by acquiring a woody taste from contact with the inside of insufficiently charred barrels. Besides postponement of time of payment of gallon tax an advantage results from exporting to Europe in that the quantity upon which customs duty is paid is the actual quantity contained in the barrel, but this advantage is insufficient to offset losses from year to year after the whisky is about eight years old. Whisky after being taken out of the United States bonded warehouses and the gallon tax paid must either be sold, carried in owner's store, or car-

ried in private warehouses at fixed charges for storage and insurance, and the latter warehouses are known as "free warehouses" in contradistinction to the bonded warehouses of the United States. Defendant *William Bergenthal,* dominating the business of the corporation since January 1, 1889, so increased the unsold stock of goods on hand that the amount and value of whisky carried in private warehouses increased from nothing on January 1, 1889, to $52,825.81 on January 1, 1904. The amount exported and remaining in warehouses in Europe increased from $2,345.18 on January 1, 1889, to $117,932.85 on January 1, 1904. The liabilities of the corporation increased from $44,127.89 on January 1, 1889, to $100,190.76 on January 1, 1904. The annual sales decreased from $335,356.14 for the year ending January 1, 1889, to $216,356.42 for the year ending January 1, 1904, and the amount of merchandise in bonded warehouses and in store at Milwaukee was also increased. January 1, 1904, the surplus carried by the corporation in merchandise and accounts and bills receivable over and above debts and capital stock was $276,936.74, and the fiscal condition of the corporation January 1, 1904, according to valuations carried on the books was as follows:

Resources.

Cash on hand and in bank		$14,329 74
Real estate, fixtures, bills receivable, and outstanding accounts, etc.		116,633 43
Merchandise in store and in warehouse on which gallon tax is paid		158,000 76
Merchandise in United States bonded warehouses subject to gallon tax		86,172 33
Merchandise exported to Europe subject to gallon tax		117,932 85
		$493,069 11

Liabilities.

To capital stock	$100,000 00	
To bills and accounts payable, with accrued interest, taking *Anna M. Bergenthal's* private account as it appears on the books	100,190 76	200,190 76
Surplus		$292,878 35

On account of the peculiarities of the wholesale liquor business, losses and expense incident to carrying large stocks of old whiskies, insufficient market therefor, and expense of shipping to Europe, the carrying and accumulation of such large surplus stock is particularly injurious to the business of the defendant corporation and must result in loss, and the longer it is carried the greater apparently such loss will be. *William Bergenthal,* having knowledge of the fact that plaintiff's stock was in pledge under contract referred to and liable to be released by payment of dividends, and knowing that defendant corporation had too large a surplus stock, that its debts were increasing, and that it was not an advantage to the other stockholders to carry such large surplus, continued to increase such surplus and prevented further dividends, and still continued his salary at $6,000, and refused to credit the three and one-half per cent. on plaintiff's notes. Such credits and dividends as were made were divided up and made partly on each note without reference to time of maturity. Such acts by *William Bergenthal* were with fraudulent intent while he occupied the fiduciary relation to the plaintiff of president and represented the plaintiff and dominated the business of the corporation through himself and his wife constituting a majority of the board of directors and controlling offices of the corporation.

(7) Since March 26, 1888, defendant *William Bergenthal* has annually drawn a salary of $6,000 and *Anna M. Bergenthal* $500. Both salaries were fixed by the board of directors, *William* and *Anna M. Bergenthal* constituting a majority, and with the conditional consent of plaintiff as evidenced by the agreement of June 16, 1888. *Anna M. Bergenthal* performed no substantial duties for the corporation, nor kept its records in person.

(8) From March 26, 1888, there was kept on the books of the corporation, under direction of *William Bergenthal,* an account current between *Anna M. Bergenthal* and the defendant corporation, which consisted of charges made against her

for miscellaneous items of indebtedness on account of moneys of the corporation paid out by the company for her and debited to her, and on the other side of a great number of credits, cash, merchandise, and sundries in favor of *Anna M. Bergenthal,* which account was the record of mutual dealings between the corporation and *Anna M. Bergenthal* incurred by the parties with the intention and expectation of offsetting one against the other, and was in its substantial nature a mutual open account current between *Anna M. Bergenthal* and the *William Bergenthal Company,* kept under the direction of *William Bergenthal,* and *Anna M. Bergenthal* was not familiar with the transactions therein contained, although sanctioning the same by acquiescence.

(9) March 2, 1891, without the knowledge of plaintiff or any other officer, director, or stockholder of defendant corporation, *William Bergenthal* executed and delivered to the Merchants' Exchange Bank of Milwaukee a note of the corporation for $16,747.96, and on that day received credit on the books of the bank for said amount in favor of the corporation. This amount was immediately and surreptitiously checked out by the corporation, acting through *William Bergenthal,* for the use of *Anna M. Bergenthal,* and the items of credit to the corporation of $16,747.96, the avails of the note, and the checks withdrawing the same were intentionally omitted from the books of account of the corporation, so that the books, although kept in detail and particularity in general, show neither the receipt nor the disbursement of said sum, or any part thereof, until years later. The note was a demand note, and was carried by the bank against the corporation from March 2, 1891, to July 1, 1893, when it was renewed and was then carried from July 1, 1893, to December 2, 1893, when $1,247 was paid by said corporation and charged to *Anna M. Bergenthal* in her account, and the remaining $15,500 was renewed in notes executed by the corporation to the bank and carried as its debt until after *Anna M. Bergen-*

thal had acquired credits against said corporation for the proceeds of the malt exchanged by her September 29, 1894, at which time the $15,500 of outstanding indebtedness on said note was debited to her in her account as an item of cash paid by the corporation to the bank for her. The corporation paid interest on this note and charged such items of interest to *Anna M. Bergenthal* in said mutual account current.

(10) At the close of the year 1891 the books of the corporation showed *Anna M. Bergenthal* a creditor to the amount of $4,706.25, while if the avails of the discount of said note of March 2, 1891, had been charged to her she would have been a debtor to the corporation to the amount of $12,041.74, and, notwithstanding this, interest was allowed her during said year on a pretended credit balance in her favor in the mutual account current as if she were continuously a creditor of said corporation. In subsequent years the avails of said note were not charged to her, so that the amount of her indebtedness to the corporation as appeared by her account was much less than it would have been had such charges been made. Such indebtedness to the corporation was fraudulently concealed by *William* and *Anna M. Bergenthal* from all the stockholders. Plaintiff did not know until about the time of the commencement of this action that the indebtedness of *Anna M. Bergenthal* at any time exceeded the amount shown by said mutual account on the books of the corporation. January 1, 1892, there came to the notice of plaintiff a demand for interest from the bank on a note on which the corporation appeared to be held as surety or indorser. He remonstrated with *William Bergenthal,* but did not know that the corporation had received any money on said note, or that *Anna M. Bergenthal* had drawn out the avails of the discount of said note from said corporation, or that it was not charged to her, but believed the matter had been taken up by her and the corporation released, and did not know that the corporation continued for any length of time on the note, or that said note

was renewed by the corporation, or carried into the other bills payable, or any of the facts and circumstances relative to the fraudulent omissions of said sum from the account of *Anna M. Bergenthal* or from the books of the corporation, but believed that the corporation had temporarily signed as surety in some form or as accommodation indorser a note for *Anna M. Bergenthal.* After making objection he understood and believed that the obligation had been taken up by *Anna M. Bergenthal.*

(11) The defendant corporation had for some time, through *William Bergenthal,* purchased rye upon commission of one cent per bushel for Kentucky distillers, and had on its books a "Rye account," and *William Bergenthal* frequently bought rye in the name of *Anna M. Bergenthal,* advanced therefor the money of the corporation, and charged the same to *Anna M. Bergenthal.* At the close of the year 1893 *Anna M. Bergenthal* had a large amount of barley on hand which she could not sell at cost, and, acting through *William Bergenthal,* in the early part of 1894 had this barley malted, paying for such malting with the money of the defendant corporation, but debiting the amount to *Anna M. Bergenthal* in said mutual account current. For several years *William Bergenthal* in his annual reports to the stockholders deprecated the large accumulation of surplus merchandise, and he knew it was not for the interest of the corporation to load up further with additional merchandise and incur liability for the gallon tax, but, notwithstanding this, he exchanged said barley malt belonging to *Anna M. Bergenthal* with distillers for whiskies of the inspection of 1894 to the amount of more than 1,000 barrels then in United States bonded warehouses subject to the gallon tax, giving *Anna M. Bergenthal* credit therefor to the amount of $21,000 in her mutual account current, and, after she had obtained credit from this source in her account, he caused to be charged to her said $15,500 of the bills payable of the corporation on September 29, 1894. More than

775 barrels of this whisky are still on hand, and most of it has been shipped to Europe. *William Bergenthal* used said rye account to conceal the transaction relative to the barley malt on the books of the corporation by crediting whisky received in exchange for the malt in account with *Anna M. Bergenthal* under designation "Rye account."

(12) In the spring of 1895 plaintiff discovered that the malt owned by *Anna M. Bergenthal* had been exchanged for whisky and the whisky turned over to the corporation, and then protested, whereupon *William Bergenthal,* for himself and *Anna M. Bergenthal,* agreed to rescind the malt transaction and take the whisky so exchanged for malt off the hands of the corporation, and thereafter repeated said agreement until February, 1901, at which time the gallon tax was due, when he repudiated such agreement, and for the first time claimed that the corporation must keep the whisky and pay *Anna M. Bergenthal* and all other charges and taxes thereon, that the carrying of said whisky involved no expense to the corporation because there were no charges thereon until it was taken out of the United States bonded warehouse, and no payments of any kind made by the corporation on any of said whisky not taken out of said bonded warehouse for consumption, sale, or export, and the whisky in bonded warehouses was represented by warehouse receipts up to the time it was necessary to remove it, and the only charge up to that time was that *Anna M. Bergenthal* had in said account a credit for the whisky so received in exchange for malt, and a debit given her September 29, 1894, for the moneys of the corporation which she had drawn out in March, 1891.

(13) In 1893, while the defendant corporation was in great stress for money and did not have sufficient to carry on its business, it was aided by plaintiff procuring loans from his personal friends.

(14) It was the practice of the defendant corporation to secure its bills payable to the bank by warehouse receipts

through a form of collateral note commonly used by the bank with a power of sale, and, in order to enable him to use warehouse receipts of the corporation as collateral security to the individual indebtedness of *Anna M. Bergenthal* to said bank, *William Bergenthal* caused to be executed to said bank one of said collateral notes with power of sale for $10,000 by himself and *Anna M. Bergenthal,* but for a part of the indebtedness owed said bank by the corporation. He then pledged warehouse receipts of the corporation as collateral to this note, and caused to be executed by himself and *Anna M. Bergenthal* another note to the bank for $10,000, money borrowed by *Anna M. Bergenthal* from the bank, so causing warehouse receipts of the corporation to be held as collateral security to the individual indebtedness of *Anna M. Bergenthal* to the amount of $10,000. During the argument of this case *William Bergenthal* procured from the bank a release of said warehouse receipts as collateral to said $10,000 note of *Anna M. Bergenthal.*

(15) While the trial was in progress *William Bergenthal* caused a meeting of the stockholders to be held, all the stockholders at that time being plaintiff, *William Bergenthal, Anna M. Bergenthal,* William F. Bergenthal, and one Adelheid Grau, a relative of *William Bergenthal.* At this meeting a resolution was proposed, against the protest of plaintiff, attempting to ratify and confirm the exchange of malt for whisky, and *William* and *Anna M. Bergenthal* voting a majority of the shares of the corporation thereon were guilty of actual fraud in the transactions and were interested parties. Adelheid Grau had no knowledge of the facts and circumstances concerning the transaction and William F. Bergenthal was under the control and domination of *William Bergenthal.*

(16) May 29, 1902, plaintiff demanded in writing of defendants *William* and *Anna M. Bergenthal* as president, treasurer, and secretary of the corporation, that the surplus merchandise be reduced by immediate sales at market rates and

applied in reduction of corporate debts and as dividends to stockholders, and that they take out whisky exchanged for malt to the amount of $37,000, and that the salaries of *William* and *Anna M. Bergenthal* be reduced. June 9, 1902, a special meeting of the directors of the corporation was called by *William Bergenthal,* at which he announced his intention of going to Europe, and resolutions were passed excluding plaintiff as vice-president from any control of or action in said business during the absence of *William Bergenthal.* Plaintiff was present at said meeting and endeavored to have resolutions passed reducing the surplus stock, reducing the salaries of *William* and *Anna M. Bergenthal,* giving the vice-president authority in the absence of the president, and requiring exchanged whiskies to be taken off the hands of the corporation by *William* and *Anna M. Bergenthal,* all of which were refused by said *William* and *Anna M. Bergenthal,* although all directors were present. It is not and was not the intention of *William* and *Anna M. Bergenthal* to take said whiskies off the hands of the corporation, or any part thereof, or to reduce said surplus stock, or to reduce their salaries, or to correct said accounts in any particular. On February 14, 1903, *William Bergenthal,* as president of said company, discharged plaintiff from the employment of said company by attempting to cut down his salary, and plaintiff thereafter started in the wholesale liquor business on his own account.

(17) *William* and *Anna M. Bergenthal,* against the plaintiff's objection, procured the passage of a resolution at the stockholders' meeting held during the trial of this action, to the effect that the attorney's fees of the defendants in this action be paid out of the funds of the corporation, and that they have been paying such attorney's fees.

As conclusions of law:

(1) That all transactions respecting the note of March 2, 1891, and its renewals and the exchange of malt for whisky were fraudulent and void; that the pledge of warehouse re-

ceipts of the corporation as security for the individual indebtedness of *Anna M. Bergenthal* and the transactions connected therewith were fraudulent in law; that the resolution passed at the meeting of stockholders during the trial of this action attempting to ratify the exchange of malt for whisky is void.

(2) That the plaintiff is entitled to have the salaries of *William* and *Anna M. Bergenthal* reduced to a reasonable amount, or to have credits agreed to be made on notes to *Anna M. Bergenthal* in the order agreed upon, and that the court would determine the relief to be given upon the coming in of the referee's report.

(3) Plaintiff is entitled to a decree that the corporation reduce its surplus merchandise on hand and in Europe by requiring *Anna M. Bergenthal* to take off the hands of the corporation whiskies which it received from her as a result of the barley-malt transaction, and to surcharge and correct her account accordingly, and to recover from her whatever she owes the corporation.

(4) The court reserves until the coming in of the referee's report the question of necessity and extent of reduction of surplus merchandise in European warehouses necessary to proper, prudent business management, leaving a reasonable discretion in the board of directors.

(5) The question of whether *William* and *Anna M. Bergenthal* account for and refund moneys paid out of corporate funds in defense of this action held in abeyance until the coming in of the referee's report, but plaintiff is entitled to have amounts so paid out ascertained upon reference, and is entitled to an injunction restraining *William* and *Anna M. Bergenthal* from further payment and from using the credit or warehouse receipts or other property of the corporation on private account.

(6) That this cause be referred by interlocutory decree to some person to be agreed upon or appointed by the court, to take evidence upon the questions reserved and state accounts and report to the court, and that the referee shall report the

reasonable market value of the services of *William* and *Anna M. Bergenthal* and the amount each has received, and ascertain and report the amount which should be credited to *Anna M. Bergenthal* under agreement of June 16, 1888; also take evidence upon and respecting *Anna M. Bergenthal's* private account on the books of the corporation; and further ascertain and report the amount in gallons, the value of and the amount necessary to be paid for expenses and customs duty in getting back into the United States all merchandise of said corporation in European warehouses and the price at which the same can be sold in the market, and ascertain and report what part, if any, of the present stock of merchandise of defendant corporation on hand over and above that carried in European warehouses ought to be sold and converted into money and applied on debts and dividends of said corporation, and ascertain and report other things specified in this conclusion.

(7) The court further finds that the statute of limitations pleaded is no bar to the action, and that plaintiff has not been guilty of laches, but reserves its decision until the coming in of the referee's report as to whether the statute of limitations may be a bar to any claim which might then be made to recover the salary of *William Bergenthal,* which he received more than six years prior to the commencement of the action.

Judgment was entered in favor of the plaintiff in accordance with the findings of fact and conclusions of law. Exceptions were duly filed, and an appeal taken from the judgment to this court.

For the appellants there were briefs by *George Sylvester,* attorney, and *Miller, Mack & Fairchild,* of counsel, and oral argument by *Mr. A. W. Fairchild* and *Mr. Sylvester.*

For the respondent there was a brief by *Timlin & Glicksman,* and oral argument by *W. H. Timlin.*

The following opinion was filed November 7, 1906:

KERWIN, J. The controversy arising upon this appeal so far as we regard it necessary to consider the questions pre-

sented may be classified in a general way under the following heads: (1) The note transaction; (2) the malt and whisky transaction; (3) salaries of *William* and *Anna M. Bergenthal;* (4) pledge of warehouse receipts; (5) statute of limitations; (6) reduction of merchandise; (7) attorney's fees paid out of corporate funds. The findings of fact present a complete history of the questions involved, and there is, with few exceptions, but little dispute upon the facts. The findings respecting fraud upon the part of the defendants are based more upon inferences drawn from admitted facts than from findings upon the controverted questions of fact.

1. It is undisputed that *Anna M. Bergenthal* received the avails of the $16,747.96 note, and that it was not charged to her until long after it was received, as found by the court; but it is also established beyond question that she paid the full amount of the note, together with interest. True, the transaction was not regularly entered, and if it had been the account of *Anna M. Bergenthal* would have appeared differently on the books, as found by the court: there would have been a large debit against her, which did not appear. But we are unable to see how the corporation was in any way injured by the irregular bookkeeping. The avails of the note simply did not appear on the account of *Anna M. Bergenthal* with the corporation, but she paid the interest by being charged in her account with the company as the same was paid upon the original note as well as upon all renewals. The loan was considered and treated as her loan, and aside from the irregular bookkeeping there seems to have been no attempt to conceal the facts from any one. In addition to paying the interest as it fell due upon the original note and all renewals thereof, *Anna M. Bergenthal* paid, December 2, 1893, $1,247.96, leaving a balance of $15,500, which was on September 29, 1894, paid. So it appears that the whole amount of this note and interest was paid by *Anna M. Bergenthal,* and the only burden assumed by the corporation was that of

loaning its credit in consequence of being a party to the note, and it does not appear that it was in any way injured by so doing. Counsel, however, claims that the transaction amounted in effect to the loaning of the money of the corporation to *Anna M. Bergenthal,* and that it was entitled to interest thereon. This contention, however, is not supported by the evidence. It is perfectly clear that the money was borrowed at the bank for the use and benefit of *Anna M. Bergenthal,* and immediately upon the execution of the note the whole amount was taken by her and the note given therefor always regarded as her obligation. It was in effect a loan from the bank for her use. Had the company paid the interest to the bank, of course *Anna M. Bergenthal* would then be obligated to it for such interest, and the principal if paid by it. It is argued that if the avails of this note had been charged to *Anna M. Bergenthal* she would have had a much larger debit in her account with the corporation, and, under the mode of doing business and system adopted and carried on, would be paying interest upon such debt. But it was entirely immaterial to the corporation whether she paid interest to it, and it paid interest to the bank, or whether she paid the interest direct to the bank. The result to the corporation would be precisely the same. The effect of the bookkeeping respecting this loan was that the note transaction was kept off the account of *Anna M. Bergenthal,* and she paid the interest and principal, and the corporation lost nothing financially by the transaction. The court found, however, that the money was taken surreptitiously from the bank, and that the transaction was fraudulent. We do not think this finding is supported by the evidence. The history of this note transaction as established by the evidence shows that the irregularity of bookkeeping was with no fraudulent intent. It is quite obvious that if the purpose was to misappropriate the money of the corporation a different course would have been pursued. The note and the renewals were carried as the loan of *Anna*

M. Bergenthal, and, although the money was not charged to her when she received it, it was treated in all transactions thereafter as her loan and the note as her obligation, and never considered or treated as an obligation of the company. When the first interest fell due the bookkeeper was informed by *William Bergenthal* that the note was the obligation of *Anna M. Bergenthal* and not that of the company and the interest was accordingly charged to her, and all subsequent instalments of interest as they fell due were charged to her in her account on the books of the corporation. So it is not easy to see how *William* or *Anna M. Bergenthal* could have had any fraudulent purpose in mind or any intent to injure the *William Bergenthal Company.* While resulting in irregular and improper bookkeeping, it worked out precisely the same as though the avails of the note had at the time of discount been charged to *Anna M. Bergenthal.*

2. The court found that the so-called malt transaction was fraudulent, but we fail to discover any evidence establishing fraud. The court below obviously drew inferences of fraud from the nature of the transaction and course of dealing which we think are not warranted by the evidence. There is no evidence that the sale was not open and fair and at a reasonable market price. There can be no doubt but that *William* and *Anna M. Bergenthal,* because of their fiduciary relation to the corporation as officers and directors, owed the highest good faith, diligence, and endeavor to promote the interest of the *William Bergenthal Company,* but they were not prohibited from selling their property to the corporation, provided the transaction was open and fair. *William* and *Anna M. Bergenthal* constituted a majority of the directors and officers of the corporation. Their acts, therefore, in dealing with it must be closely scrutinized. But after careful examination of the evidence we fail to find anything tending to show that they did not so act in the utmost good faith. In 1894 *Anna M. Bergenthal,* through *William Bergenthal,* sold to the cor-

poration 1,161 barrels of whisky which had been received in exchange for malt owned by her, and she was given credit on her account for said whisky at a fair market value, so the company, by the transaction, was buying whisky at its fair market value. Such a transaction, although carried out through the directors in disposing of their own property to the corporation, is valid. *Spaulding v. North Mil. T. S. Co.* 106 Wis. 481, 81 N. W. 1064; *Milwaukee C. S. Co. v. Dexter,* 99 Wis. 214, 74 N. W. 976; *Franey v. Warner,* 96 Wis. 222, 71 N. W. 81; *Twin-Lick Oil Co. v. Marbury,* 91 U. S. 587; *Richardson's Ex'r v. Green,* 133 U. S. 30, 10 Sup. Ct. 280. The sale was not only for the fair market value, but was open and the transaction entered upon the books and known to the stockholders. The plaintiff admits that he had knowledge of the transaction as early at least as 1895, but claims at that time he objected and that *William Bergenthal* promised to take the whisky off the hands of the corporation, but nothing was done to carry out such alleged promise from 1895 to 1902. Moreover, during this time the company was buying whisky from other parties. In the purchase from *Anna M. Bergenthal* the company simply pursued its customary business policy, bought the whisky at a fair market price, and entered the transaction respecting it on the books of the corporation. Under such circumstances there can be no inference of fraud. *Lavassar v. Washburne,* 50 Wis. 200, 6 N. W. 516; *Baumann v. Lupinski,* 108 Wis. 451, 84 N. W. 836; *Burnham v. Burnham,* 119 Wis. 509, 97 N. W. 176.

It is argued that the company was overstocked with whisky at the time of the purchase from *Anna M. Bergenthal,* and that *William Bergenthal* so understood and said in his report to the stockholders, in consequence of which the condition of the company was deplorable; but an examination of the reports and correspondence referred to shows that the complaint was based largely upon the falling off of sales, and not upon bad business policy in the purchase of whisky. As appears

from the evidence, *William Bergenthal* purchased the whisky in question from *Anna M. Bergenthal* for the corporation, and on March 2, 1891, credited to her upon the books of the corporation $15,500 in payment for such whisky, which was the balance due upon the $16,747.96 note and its renewals. *William Bergenthal* obviously regarded this purchase as good business policy, and there is no evidence to show that it was not as fair and open and upon as fair terms as purchases of whisky from other parties. So it must follow that, if any mistake was made which worked injury to the corporation, it resulted from error of judgment and not from any fraud on the part of *William Bergenthal.* There is abundance of evidence that in view of the nature of the company's trade the purchase and holding of large quantities of whisky was good business policy. But, whether this be true or not, courts cannot, in the absence of fraud, engage in regulating the conduct of the business of corporations against the wishes of a majority of the directors and stockholders, so long as the corporation is acting within the scope of its powers. As said in *Gamble v. Queens Co. W. Co.* 123 N. Y. 91, 99, 25 N. E. 202:

"It is not, however, every question of mere administration or of policy in which there is a difference of opinion among the stockholders that enables the minority to claim that the action of the majority is oppressive, and which justifies the minority in coming to a court of equity to obtain relief. Generally the rule must be that in such cases the will of the majority shall govern. The court would not be justified in interfering even in doubtful cases, where the action of the majority might be susceptible of different constructions. To warrant the interposition of the court in favor of the minority shareholders in a corporation or joint-stock association, as against the contemplated action of the majority, where such action is within the corporate powers, a case must be made out which plainly shows that such action is so far opposed to the true interests of the corporation itself as to lead to the clear inference that no one thus acting could have been in-

fluenced by any honest desire to secure such interests, but that he must have acted with an intent to subserve some outside purpose, regardless of the consequences to the company and in a manner inconsistent with its interests. Otherwise the court might be called upon to balance probabilities of profitable results to arise from the carrying out of the one or the other of different plans proposed by or on behalf of different shareholders in a corporation, and to decree the adoption of that line of policy which seems to it to promise the best results, or, at least, to enjoin the carrying out of the opposite policy. This is no business for any court to follow." *Theis v. Durr,* 125 Wis. 651, 104 N. W. 985; 2 Clark & M. Priv. Corp. 544 (a), and cases; *Leslie v. Lorillard,* 110 N. Y. 519, 18 N. E. 363; *Hawes v. Oakland,* 104 U. S. 450; *Rothwell v. Robinson,* 44 Minn. 538; *Shaw v. Davis,* 78 Md. 308, 28 Atl. 619; *Waldoborough v. K. & L. R. Co.* 84 Me. 469, 24 Atl. 942; *Pratt v. Pratt, Read & Co.* 33 Conn. 446.

The court found that the resolution passed ratifying this malt-whisky transaction was fraudulent, that *William* and *Anna M. Bergenthal* were interested parties, and that *William* dominated the stockholders and directors. But all the stockholders, except plaintiff, voted for the resolution. Furthermore, the transaction appeared on the books of the corporation from the time of sale and appeared continuously in the treasurer's report, and was approved at each annual meeting by at least a majority of the stockholders. Besides, part of the whisky was sold long before this action was brought. It is quite clear from the evidence that had the agreement referred to in the statement of facts respecting the payment to plaintiff of three and one-half per cent. on his note to *Anna M. Bergenthal* been complied with, this action would not have been instituted, and that plaintiff's real purpose in so doing was not to forward the interest of the corporation but his own. So it can hardly be said that plaintiff occupies the position of an innocent stockholder so as to bring him within the right to invoke the aid of a court of equity when all other stockholders are opposed to the maintenance of the action.

3. An annual salary of $6,000 to *William Bergenthal,* president of the corporation, and $500 to *Anna M. Bergenthal,* secretary, have been paid since 1888. These salaries have been annually allowed by all the stockholders, including respondent. After the commencement of this action and in 1903 respondent presented a resolution to reduce the president's salary to $3,000 and the secretary's to $25, which resolution was defeated by a vote of 781 to 219 shares, and the salaries were again placed at $6,000 and $500 respectively, as formerly. True, respondent had an agreement with *William* and *Anna M. Bergenthal* that he should receive three and one-half per cent. upon his interest in the *William Bergenthal Company* so long as *William Bergenthal's* salary remained at $6,000. It seems to be conceded by counsel for respondent that this agreement was void as against public policy, and there is very respectable authority so holding. *Guernsey v. Cook,* 120 Mass. 501; *Fennessy v. Ross,* 5 App. Div. 342, 39 N. Y. Supp. 323. Obviously, respondent's objection is not that the salary of the president is too high, but that the president and secretary have failed to keep their agreement to pay him three and one-half per cent. upon his interest in the *William Bergenthal Company* while the salary remained so fixed. Whether respondent has any claim for the three and one-half per cent. cannot be determined in this action. This is a personal, not a corporate, claim, and not one contemplated or authorized by secs. 3237–3239, Stats. 1898, under which this action is brought. *South Bend C. S. P. Co. v. Geo. C. Cribb Co.* 97 Wis. 230, 72 N. W. 749; *Gores v. Day,* 99 Wis. 276, 74 N. W. 787; *Jenkins v. Bradley,* 104 Wis. 540, 552, 80 N. W. 1025; *Killen v. Barnes,* 106 Wis. 546, 82 N. W. 536. The court below found that the respondent is entitled to have the salaries of *William* and *Anna M. Bergenthal* reduced or else have credit on his notes as agreed, and that the court should determine which relief be granted on the coming in of the referee's report. All the stockholders, including re-

spondent, having voted to fix the salaries at $6,000 and $500 respectively, from 1888 down to the commencement of the action, respondent cannot now be heard in a court of equity on behalf of the corporation in an action to reduce them because of a personal grievance of his own. *Killen v. Barnes, supra; Harrigan v. Gilchrist,* 121 Wis. 127, 99 N. W. 909. In 1 Morawetz, Priv. Corp. (2d ed.) § 262, it is said:

"There is, however, evident propriety in refusing to allow a shareholder to sue on account of a wrong which he has voluntarily acquiesced in and condoned, even although the corporation might sue for his benefit. The plaintiff under these circumstances would have no meritorious cause of complaint, and he would be allowed to share in the benefits of a recovery by the corporation, merely because it would be impossible to separate his interest from the interests of the other shareholders. If the remaining shareholders should subsequently acquiesce in the transaction the corporation itself would be bound and the entire cause of complaint be barred. Individual shareholders who have acquiesced should at least be disqualified from suing where the other shareholders and the company through its agents have taken no steps to assert its rights."

4. *William* and *Anna M. Bergenthal* executed on November 6, 1901, two notes of $10,000 each to the First National Bank of Milwaukee. The makers received the avails of one of these notes, and the proceeds of the other were received by the *William Bergenthal Company* and credited to it on the books of the company. To secure one of these notes the makers deposited 103 shares of the capital stock of the *William Bergenthal Company* owned by *Anna M. Bergenthal.* To secure the other were deposited warehouse receipts of the *William Bergenthal Company* for 1,414 barrels of whisky. The regular form of collateral note used by the bank containing the provision that the collateral was deposited as collateral "for the payment of this or any other direct or indirect liability or liabilities of ours to said bank, due or to become due, that may be hereafter contracted or existing, however ac-

quired by said bank," was given. This form of note in legal effect made the warehouse receipts collateral to the note, the proceeds of which *William* and *Anna M. Bergenthal* received. During the trial the bank executed and delivered an instrument canceling so much of this collateral agreement as provided that the warehouse receipts be applied or held as security for any individual indebtedness of the makers. The court below found that the pledge of these warehouse receipts was fraudulent in law, and that plaintiff was entitled to an injunction restraining *William* and *Anna M. Bergenthal* from using the credit or property of the corporation for private purposes. We cannot discover from the evidence that there was any intention to defraud in the pledge of the warehouse receipts. It seems the clause making them collateral to individual indebtedness was an unconscious error, promptly corrected when discovered, and it does not appear that the company was injured thereby. There is nothing in the evidence indicating that defendants threatened or intend to use the company's credit fraudulently or to its injury, and under such circumstances the injunction should not have been awarded. *Cobb v. Smith,* 16 Wis. 661; *Quin v. Havenor,* 118 Wis. 53, 94 N. W. 642.

5. Whether the note transaction or the malt and whisky transaction resulted in any wrong to the corporation, or whether the findings of fact in regard thereto are supported by the evidence, we deem wholly immaterial, because it is clear that if any cause of action ever existed respecting these claims the same is barred by the statute of limitations. Conceding these transactions to have been fraudulent, there can be no doubt the *William Bergenthal Company* could immediately after the sale of the whisky to the corporation have repudiated the transaction and sued at law for damages, or brought an action in equity to avoid the sale and to restore the corporation to its former rights, and either action would have been barred in six years from the time the right of action accrued. *Buttles*

v. De Baun, 116 Wis. 323, 93 N. W. 5; *Boyd v. Mut. F. Asso.* 116 Wis. 155, 90 N. W. 1086, 94 N. W. 171; *Pietsch v. Milbrath,* 123 Wis. 647, 101 N. W. 388, 102 N. W. 342; *Kane v. Bloodgood,* 7 Johns. Ch. 90. Where the remedy at law and that in equity are concurrent upon the same state of facts the action in equity is barred, irrespective of the discovery of the facts constituting the fraud, when the action at law is barred. But where the action is one for relief upon the ground of fraud in a case which was on or before the 28th day of February, 1857, solely cognizable by a court of chancery, the cause of action is not deemed to have accrued until the discovery by the aggrieved party of the facts constituting the fraud. Subd. 7, sec. 4222, Stats. 1898. The right of action, therefore, having accrued at least as early as 1895 is, in any event, governed by the six-year statute, and was barred in 1902 when this action was commenced. We think the action before us is one for relief upon the ground of fraud in a case where law and equity have concurrent jurisdiction, and is governed by *Boyd v. Mut. F. Asso., supra,* and *Pietsch v. Milbrath, supra.* But if it be conceded, as claimed by counsel for respondent, that the action is one cognizable solely by a court of equity, we cannot see how the respondent is in any better position, since in such case the cause of action would be barred within six years after the discovery of the facts constituting the fraud, under subd. 7, sec. 4222, Stats. 1898. As we understand the argument of counsel for respondent it is claimed that the particular kind of action here brought is not one falling within the concurrent jurisdiction of law and equity, because antecedently to the statutes upon the subject the jurisdiction was vested exclusively in courts of chancery and has always so continued, and that the power given by sec. 3237, Stats. 1898, is such power as can only be exercised by a court of equity. But subd. 7, sec. 4222, Stats. 1898, is expressly made to apply generally to causes of action which before the Code were solely cognizable by a court of chancery, where the relief

sought was upon the ground of fraud, and makes the limitation six years after the discovery of the facts constituting the fraud. So it seems to us that, upon any theory of the case, the action must be barred, and we are unable to see that it would make any difference whether, in an action brought under this statute against a corporation, various and different causes of action might be asserted, provided in such action the right of recovery was primarily based upon fraud and the relief sought upon that ground. Of course, in the case at bar the right to any of the relief prayed for must necessarily depend upon whether the officers of the corporation were guilty of fraud. The alleged cause of action to reduce the salaries and the claims made in consequence of the so-called note transaction and malt-whisky transaction are based upon fraud, and the relief sought in the action respecting accounting, reduction of stock, and appointment of receiver are incidental to the question of fraud. So the cause of action here must stand or fall upon the question of fraud.

But it is argued that because of the fiduciary relation existing between the corporation and its officers, and the system of mutual charges and credits kept between the corporation and *Anna M. Bergenthal,* the right of action did not accrue in favor of the corporation until not only a demand had been made, but there was a refusal or neglect of the agent to comply with the demand, and that "here no demand could have been made by the corporation and there was no refusal until 1902." It is established in the case, however, that the directors and at least a majority of the stockholders, including the respondent, knew of the alleged fraud as early as 1895, the dealings respecting the malt and whisky transaction and the salary transaction being the ones upon which respondent's right of action, if any, rested. There is evidence that in 1895 and thereafter the respondent made complaint respecting the malt-whisky transaction, and that defendant *William Bergenthal* promised to take the whisky off the hands of the corpo-

ration, but that this was never done, and the fraud, if any existed, was discovered as early as 1895, and upon any theory of the statute of limitations the right of action then accrued. The contention made by counsel for respondent that the right of action did not accrue until demand and refusal in a case like the one at bar has been repudiated by this court. *Boyd v. Mut. F. Asso.* 116 Wis. 155, 90 N. W. 1086, 94 N. W. 171; *Buttles v. De Baun,* 116 Wis. 323, 93 N. W. 5; *Pietsch v. Milbrath,* 123 Wis. 647, 101 N. W. 388, 102 N. W. 342. The cases cited by counsel for respondent upon the proposition that an action by the principal for accounting is not barred so long as the fiduciary relation continues are not applicable. They rest mainly upon the doctrine that concealment of fraud postpones the operation of the statute, or upon some other relation existing between the agent and principal which prevents the bringing of notice home to the principal, in actions solely cognizable by courts of equity. *Kane v. Bloodgood,* 7 Johns. Ch. 90; *Teasley v. Bradley,* 110 Ga. 497, 35 S. E. 782; *Wilson v. Miller* (Va.) 51 S. E. 837; *McHarry v. Irvin's Ex'r,* 85 Ky. 322, 3 S. W. 374, 4 S. W. 800; *Coxe v. Huntsville G. L. Co.* 106 Ala. 373, 17 South. 626; *Danville, H. & W. R. Co. v. Kase* (Pa.) 39 Atl. 301. Some of the cases cited by counsel for respondent hold that while the agent is in the performance of his duty his possession of money or property is presumed to be rightful and subordinate to the rights of the principal, and the statute does not begin to run until demand is made. But these cases can have no application here, where the action is based upon fraud of which the corporation had actual notice and the facts show that the acts of the agent are utterly inconsistent with an innocent construction. *Buttles v. De Baun,* 116 Wis. 323, 93 N. W. 5; *Pietsch v. Milbrath,* 123 Wis. 647, 101 N. W. 388, 102 N. W. 342. The contention that the action is to recover upon a mutual open account current cannot be sustained. The action is based upon fraud and not upon con-

tract, to which the limitation of sec. 4226 applies. This section manifestly has reference to an action contractual in its nature, based upon an obligation to pay the balance due upon an open account. We think it clear that secs. 3237–3239, Stats. 1898, under which this action is brought, are not based upon any right to enforce a contract obligation against the corporate officers. So the only claims here which constitute any basis whatever for an action under secs. 3237–3239 were barred by the statute of limitations at the time of the commencement of this action.

6. We think that no reduction of merchandise should be ordered. We have heretofore referred to the doctrine that business policy or wisdom of officers of a corporation, when free from fraud and not *ultra vires,* should not be interfered with by courts where a majority of the stockholders and directors favor such policy. The judgment below reserved until the coming in of the referee's report the question of necessity and extent of reduction. The record does not present such a case as to warrant interference by the court. There is no sufficient evidence to warrant the finding that the stock was carried fraudulently or for any unlawful purpose. On the contrary there is ample evidence to support a finding that it was good business policy to pursue the course adopted. Respondent admits that the question is one of business policy. Such matters must be settled by the stockholders. As said in *Durfee v. O. C. & F. R. Co.* 5 Allen, 230:

"It may be stated as an indisputable proposition that every person who becomes a member of a corporation aggregate by purchasing and holding shares agrees by necessary implication that he will be bound by all acts and proceedings within the scope of the powers and authority conferred by the charter, which shall be adopted or sanctioned by a vote of the majority of the corporation, duly taken and ascertained according to law. This is the unavoidable result of the fundamental principle that the majority of the stockholders can regulate and control the lawful exercise of the powers conferred on a corporation by its charter."

The authorities are quite uniform that in the lawful affairs of a corporation it must be left to govern itself as to the wisdom or policy of pursuing one course or another in the conduct of its business. And to what extent stock shall be accumulated is ordinarily within the discretion of the managing officers of the corporation. *Morey v. Fish Bros. W. Co.* 108 Wis. 520, 84 N. W. 826; *Trimble v. Am. S. R. Co.* 61 N. J. Eq. 340, 48 Atl. 912; *N. Y., L. E. & W. R. Co. v. Nickals,* 119 U. S. 296, 7 Sup. Ct. 209; *Park v. Grant L. Works,* 40 N. J. Eq. 114, 3 Atl. 162; *McNab v. McNab & H. Mfg. Co.* 62 Hun, 18, 16 N. Y. Supp. 448; *Burden v. Burden,* 159 N. Y. 287, 54 N. E. 17; *Storrow v. T. C. C. & M. Asso.* 87 Fed. 612. We fail to find any evidence of bad faith or improper motive in the accumulation of merchandise or manner of carrying it, or any warrant in the record sufficient to justify the court in interfering.

7. Respecting the payment of attorney's fees out of corporate funds in the defense of this action little need be said. Clearly, if no case is made against defendants it is not improper or unjust that the corporation should pay for the defense of the action.

It follows from what has been said that the matters growing out of the so-called note and malt-whisky transactions were barred by the statute of limitations at the time of the commencement of this action; that the salaries of *William* and *Anna M. Bergenthal* were allowed, voted, and ratified by all the stockholders and directors, including respondent, and that he cannot be heard to question them in this action, and that his claim for percentage cannot be considered; that there is no evidence to warrant the finding of fraud in the pledge of warehouse receipts, nor sufficient evidence to justify interference by the court in reduction of merchandise; that the corporate funds were lawfully used in defense of this action. The respondent, therefore, has no cause of action, and the judgment below must be reversed.

By the Court.—The judgment of the court below is re-

versed, and the cause remanded with instructions to dismiss the complaint.

The respondent moved for a rehearing.

The following opinion was filed February 19, 1907:

KERWIN, J. The former opinion of the court is attacked by the learned counsel for respondent in a very able and elaborate argument upon motion for rehearing. It is the duty of a court of last resort to hear with patience and deliberately consider argument presented for the purpose of convincing it that its former decision was wrong and should be corrected. It is quite apparent that professional zeal has led counsel for respondent astray in many of the points urged with so much confidence in the argument for rehearing. We shall not attempt to discuss in detail the numerous points made upon the argument. We do not disagree with counsel that this court should not ignore the rule that the findings of the court below should not be disturbed unless against the clear preponderance of the evidence. The error of counsel on this point consists, in the main, in treating conclusions of law, or such in effect, found in the trial court's decision, as conclusions of fact, and also in failing to apply the rule that conclusions of fact reached by wrong application of legal principles do not fall within the rule which counsel claims was overlooked by this court in its decision.

When the trial court finds the facts of the case and follows such findings with conclusions contrary to what is legitimately deducible from such facts, to the effect that the transaction was fraudulent, harmful, and void, and this court, in effect, reverses such conclusion, it cannot be said that the rule invoked has any application. This proposition is well illustrated by counsel's treatment of the note transaction. The trial court found this transaction fraudulent, in that it was corruptly done by *Anna M. Bergenthal* and her husband to

the advantage of *Anna M. Bergenthal* and the injury of the *William Bergenthal Company.* We could not reach the conclusion arrived at by the court below upon this transaction, for the obvious reason that the undisputed facts show that no such conclusion could follow. The note from first to last was treated as the indebtedness of *Anna M. Bergenthal,* and was paid by her, principal and interest, without any damage to the *William Bergenthal Company.* We do not mean to justify the use of the credit of the company by *Anna M. Bergenthal* on private account, or irregularity in the manner of keeping the account with the corporation. But it does not appear that such conduct did in any way injure the corporation, nor that the parties thereby attempted to injure the corporation. We regarded the proposition so plain upon the undisputed facts that we considered the mere statement of it in the former opinion sufficient, and therefore did not go into a detailed statement of the account. But counsel in their brief on motion for rehearing go into an elaborate discussion of the matter, endeavoring to show that the corporation in fact lost by the transaction. This argument is based upon a palpably erroneous statement of the account between *Anna M. Bergenthal* and the corporation. The error occurred by taking the account as kept on the books of the corporation, in which interest on the note, as the same was paid from time to time to the bank, was charged to *Anna M. Bergenthal,* with interest on each item from the date of payment to the 1st day of the succeeding January, and, without eliminating those matters, changing the book showing of her indebtedness at the beginning of the period which counsel take for illustration by charging up the note to her, and then charging interest thereon from the time the note was given to the end of the period, thus debiting *Anna M. Bergenthal* with double interest. In that way a loss to the corporation for the year 1891 of $833.34 is easily shown. Correcting the error thus manifestly made by charging *Anna M. Bergenthal* with the appar-

ent loss shown by the erroneous statement, and crediting her back with the interest charged in her account on account of the note, we have this result:

Anna M. Bergenthal, Dr.

To the loss claimed	$833 34	
Cr.		
Interest charged August 3, 1901		$334 94
Interest on same to January 1, 1902		8 26
Interest charged October 31, 1901		251 22
Interest on same to January 1, 1902		2 50
Interest for balance of the year charged in the account the succeeding year		251 22
Balance credit	14 80	
	$848 14	$848 14

It is unnecessary to pursue the investigation of the note transaction further. It is needless to say that a continuation of the accounting to the end would show the same result as above indicated, namely, no loss to the corporation. The plain fact is that the corporation loaned its credit to *Anna M. Bergenthal.* She paid the note in two instalments and the interest as it fell due, and the amounts were paid by the corporation and charged to her at the respective dates when paid.

The claim made, that in the opinion it is said that *Anna M. Bergenthal* received credit for $15,500 March 2, 1891, when it should have been September 29, 1894, simply calls attention to a clerical error, which is clearly shown to be such by reference to other parts of the opinion. The second paragraph of the opinion refers to the payment of the principal of the note in two instalments, one December 2, 1893, of $1,247.96, and the other on September 29, 1894, the date March 2, 1891, of credit to *Anna M. Bergenthal* of $15,500, being an error which is apparent on the face of the opinion, which, as counsel says, should be September 29, 1894. So it is very clear that the correction of *Anna M. Bergenthal's* account so as to charge her with the proceeds of the note, $16,747.96, as of March 2, 1891, and give her credit for interest paid,

would work no benefit to the corporation. It is also clear that no wrong to the corporation was intended and no fraud involving moral turpitude perpetrated. That no loss occurred to the corporation through the note transaction is susceptible of absolute demonstration.

What was said in the opinion respecting the malt transaction is based on the law that a business transaction between a corporation and one of its officers, whereby the latter sells to or buys from the former, is not absolutely void, or even voidable, under all circumstances. It is not to be classed with the transaction of an administrator, guardian, or executor who buys property belonging to the trust estate. The authorities cited in the original opinion are ample on this proposition. An officer of a corporation may sell to the latter so long as he acts openly and does no injury to the corporation and the transaction is within the scope of the corporate business of the corporation. It is true that, when an officer of a corporation transacts business with it in which he has a personal interest, his acts should be carefully scrutinized, and, if it appears that the object of his dealings was for the purpose of gain to himself and loss to the corporation, or the dealing was rendered harmful to the corporation merely because the transaction was with the officer instead of an outside party, the transaction should not be upheld if seasonably questioned. *Twin-Lick Oil Co. v. Marbury,* 91 U. S. 587. But upon the undisputed evidence no case is made which would warrant a court in upsetting the malt transaction. The policy of purchasing whisky on the same terms and at the same market price was established. The corporation was engaged in the purchase from others, and when the purchase of the *Anna M. Bergenthal* whisky was made the company was pursuing its established business policy. There was no duplicity in the transaction with *Anna M. Bergenthal* and no preference or advantage given her. The corporate business policy of buying whisky at that time was settled. It was not adopted for the purpose of

buying from *Anna M. Bergenthal,* but for buying whisky generally, and, even if it turned out to be bad policy, this alone was not ground for repudiating a purchase made from *Anna M. Bergenthal.* The contract must stand or fall on the *bona fides* of it, and not on whether the corporation wins or loses by it because of good or bad business policy on the part of the officers of the corporation. As we said in the former opinion, whether the note transaction or the malt transaction was of such a character, if attacked seasonably, as would warrant a court in setting it aside, is wholly immaterial here, since the cause of action in each case accrued more than six years before the commencement of this action and was barred, to say nothing of laches in not seasonably moving in the matter, which, we think, alone would be sufficient to defeat the present action. *Glenwood Mfg. Co. v. Syme,* 109 Wis. 355, 85 N. W. 432. Besides, these transactions were annually ratified by a majority of the stockholders. Counsel for respondent contend in their brief on this motion as in original brief that the statute does not run because the account is a mutual account current. We said in former opinion, and we think rightly, that this case does not come within the statute governing mutual open accounts current. But even if it did it would still be barred, because the *Anna M. Bergenthal* account was stated annually with the corporation and a balance struck, and the matters respecting the note transaction and malt and whisky transaction were included in the account stated more than six years before the commencement of this action. The authorities cited by appellant's counsel on original hearing are ample on this point. All the items entering into these disputed matters respecting the note and malt transactions were included in the account stated between *Anna M. Bergenthal* and the corporation more than six years before the action was commenced, and the account voted on and allowed by all the stockholders, including the plaintiff, as early as 1894, and annually thereafter. Where a balance

in a mutual account current between parties is stated, the six-year statute of limitations commences to run as to the transactions included in the account up to that time. *Spring v. Ex'rs of Gray,* 6 Pet. 151; *Toland v. Sprague,* 12 Pet. 300; *Baird v. Crank,* 98 Cal. 293, 33 Pac. 63; *Breckenridge v. Baltzeall,* 1 Ind. 333; *Brooke's Adm'rs v. Shelly,* 4 Hen. & M. 266; *Schall v. Eisner,* 58 Ga. 190; *Estes v. Hamilton-B. S. Co.* 54 Mo. App. 543; *Union Bank v. Knapp,* 3 Pick. 96; *Belchertown v. Bridgman,* 118 Mass. 486; *Thompson v. Fisher,* 13 Pa. St. 310. All disputed matters respecting the note, malt, and whisky transactions were included in the account as stated between *Anna M. Bergenthal* and *William Bergenthal Company,* defendant, more than six years before this action was commenced.

In respect to the salary matter, we said in former opinion that these salaries were annually allowed by the stockholders. This statement is attacked. We think this statement is strictly correct. They were included in the report at the annual meetings and allowed. It is elementary law that an officer of a corporation while acting as a director cannot fix his own salary so as to bind the corporation in an action by it or by a nonconsenting stockholder in its name challenging the validity of the salary. But, where the stockholders ratify the salary so fixed, the act becomes binding on the corporation and all stockholders. Here plaintiff agreed to the salary, but under an agreement that he should receive a consideration. He cannot be heard in a court of equity either in his own behalf or that of the corporation to challenge it, at least up to the time of rescission. No rescission appears. On the contrary, the plaintiff insisted up to the time this action was brought, and so far as appears is still insisting, upon the three and one-half per cent. on his interest. Plaintiff wanted the benefit of his contract or the salaries reduced. And the court below found that respondent was entitled to have the salaries reduced or have credit as agreed, and that the court on the coming in of the

referee's report would determine which relief he would grant. In face of this situation clearly the plaintiff has no standing in a court of equity asking for reduction of the salaries of *William Bergenthal* and *Anna M. Bergenthal.*

We shall not prolong this opinion by further discussion. We fully appreciate the painstaking care with which the learned trial court dealt with this case and the dignity which should be accorded to his decision. We differ with the trial court mainly on questions of law and not to any considerable extent on pure matters of fact. We have examined with patience and care the argument of counsel for respondent upon this motion, but have been unable to bring ourselves to the conclusion that a rehearing should be granted.

By the Court.—The motion for a rehearing is denied with $10 costs.

TIMLIN, J., took no part in the decision of this case.

BRUNETTE, Respondent, vs. NORBER, Appellant.

January 12—February 19, 1907.

Husband and wife: Right of wife to acquire property: Tax titles: Actions to try title: Limitation of actions: "Grantee."

1. A married woman has a right to acquire title to real property by accepting a warranty deed from a tax-title grantee and paying therefor from her own separate estate.
2. In an action of trespass it was established by the verdict of the jury and the undisputed evidence that plaintiff, a married woman, was in the actual possession of the premises in dispute from June 11, 1896, the time a void tax deed was recorded, down to and including January 24, 1906, the time when the alleged trespass was committed, and that neither defendant nor any person under whom he claimed title had paid any taxes on such premises, but on the contrary that the plaintiff had paid all the taxes thereon after the execution of the tax deed.

Sec. 1189*b*, Stats. 1898, which went into effect September 1, 1898, provides that "no action shall be brought by the original owner for the recovery of lands purporting to be conveyed for the nonpayment of taxes by a deed void on its face after the expiration of five years from the date of the recording of the tax deed, in cases where the grantee in the tax deed shall have taken actual possession of such land within two years after such recording and shall have actually and continuously maintained such possession to the end of such period of five years." *Held*, that plaintiff's case came within the language of such statute, and established her title.

3. In such case plaintiff was a "grantee" within the calls of sec. 1189*b*, Stats. 1898, although she was not named as such in the tax deed, but only as grantee in a warranty deed given her by the person to whom the tax deed was issued, the word "grantee," in sec. 1189*b*, being governed by the rule of construction contained in subd. 4, sec. 4971.

APPEAL from a judgment of the circuit court for Brown county: SAMUEL D. HASTINGS, Circuit Judge. *Affirmed.*

This is an action of trespass commenced January 24, 1906, to recover damages for cutting grass and timber on the lands described between September 1, 1905, and December 15, 1905. The plaintiff claims title to such lands under a tax deed issued to one August Ysebaert, assignee of A. L. Gray, executed June 10, 1896, and recorded June 11, 1896, and a warranty deed from said August Ysebaert and wife to the plaintiff, executed and delivered at the same time and duly recorded November 6, 1896, and actual possession under said deeds from June 11, 1896, down to the commencement of this action. The defendant answered by way of admissions, denials, and counter allegations to the effect that the defendant and the heirs at law of one Charlotte Vieau were and are the owners in fee and in possession of all the lands described; that the tax deed under which the plaintiff so claims title was issued by the city of Green Bay, and recorded more than three years prior to the commencement of this action; and that the plaintiff has not been in the actual possession of said premises or any part thereof for three years successively dur-

ing the five years next after the recording of such deed, and during such time the defendant had been in the actual and continued possession as such owner, and hence that the plaintiff is barred from maintaining the action; that for more than ten years prior to the commencement of this action the defendant and his grantors had owned and occupied said premises under color of title upon a written instrument, and had been in continued, open, and notorious possession thereof under color of title, to wit, a deed from the original owner to M. A. Sellers, dated May 10, 1890, and from the heirs at law of M. A. Sellers, deceased, to defendant, dated July 1, 1905.

The record evidence is quite voluminous. A number of admissions and stipulations were made by the respective parties. Each party moved to have a verdict directed in his or her favor, except that the question of damages should be left to the jury. After considerable parleying between the court and the counsel as to the question or questions to be submitted to the jury, counsel for the defendant stated:

"We ask the court to submit to the jury the question whether or not the plaintiff was in possession of the premises in dispute during the summer of 1905, on the testimony during the season of 1905, including the time that the alleged trespass was committed."

The court thereupon inquired as to what was the conflict in the testimony, and counsel thereupon stated in effect that the conflict in the testimony was as to who was in possession when the defendant acquired his deed and took peaceable possession. The court thereafter submitted to the jury this question: "Was the plaintiff, *Johanna Brunette,* in possession of the premises in question when the defendant, *Peter Norber,* entered on the same in September and December, 1905, and cut the grass and trees?" Answer of the jury: "Yes." Thereupon, and "upon the law and undisputed evidence in the case, and the special verdict of the jury, and on the motion of

the plaintiff's attorneys," it was thereby "ordered that judgment be entered in favor of the above-named plaintiff and against the above-named defendant for the sum of $15 damages, and costs and disbursements of the plaintiff, to be taxed by the clerk." From the judgment entered accordingly the defendant appeals.

For the appellant there was a brief by *Sheridan & Evans* and *John F. Watermolen,* and oral argument by *Philip Sheridan.*

For the respondent there was a brief by *Neville & Tracy,* and oral argument by *John E. Tracy.*

CASSODAY, C. J. There is no claim that the defendant was in possession of the premises prior to the time he obtained his deed dated July 1, 1905, mentioned in his answer. There was some question as to whether the plaintiff acquired the tax title in good faith or in collusion with her husband and for his benefit. It is undisputed, however, that the record title under the tax deed was taken in the name of the plaintiff and for her benefit, and that she paid for the same from her own separate property. It is conceded that such tax deed was void upon its face. True, there is evidence tending to prove that work was performed on the land for the plaintiff's husband, but it also appears, and is undisputed, that the plaintiff lived thereon and paid for such services. Under the repeated rulings of this court, the right of a married woman to acquire title in the manner indicated cannot be seriously doubted. *Dayton v. Walsh,* 47 Wis. 113, 2 N. W. 65; *Kendall v. Beaudry,* 107 Wis. 180, 184, 83 N. W. 314; *Kriz v. Peege,* 119 Wis. 105, 109, 95 N. W. 108, and cases there cited. As indicated in the statement of facts, the jury found that the plaintiff was in possession of the premises when the defendant entered upon the same and cut the grass and trees as mentioned. Such finding is amply supported by the evidence. The value of such grass and trees appears from the

testimony of the defendant and is undisputed. It is established by the verdict of the jury and the undisputed evidence that the plaintiff was in the actual possession of the premises from the time the tax deed was recorded down to and including the time when the alleged trespass was committed. During that time neither the defendant nor any person under whom he claimed title paid any taxes on the premises. On the contrary the plaintiff paid all taxes thereon after the execution of such tax deed. In view of such undisputed evidence and such verdict, the question recurs whether the plaintiff has established her title to the premises by virtue of such actual possession under such void tax deed during the time mentioned. The general purpose of the statutes in respect to taxes is to secure the early payment of the same and to bar all controversies in regard to such taxes within certain limited periods. Not only are the grantee in a tax deed and those claiming under him limited to certain periods within which to enforce their claim against the land, but the former owner and those claiming under him are also limited to certain periods within which to avoid such tax deed. Secs. 1187–1189*b*, Stats. 1898. Among the limitations upon the former owner is an amendment proposed by the revisers of the Statutes of 1898 and adopted by the legislature, which declares:

"No action shall be brought by the original owner for the recovery of lands purporting to be conveyed for the nonpayment of taxes by a deed void on its face after the expiration of five years from the date of the recording of the tax deed, in cases where the grantee in the tax deed shall have taken actual possession of such land within two years after such recording and shall have actually and continuously maintained such possession to the end of such period of five years." Sec. 1189*b*, Stats. 1898.

It is said in a note by the revisers that such amendment was "intended to apply such limitation even if the tax sale was without jurisdiction, since the limitation depends wholly on color of title and actual possession of part or all of the land in question." See cases there cited. The case presented

comes squarely within the language of the statute quoted. True, the plaintiff is not named as grantee in the tax deed, but is named as grantee in the warranty deed given to her by the person to whom such tax deed was issued. Our statute declares:

"The word 'grantor' may be construed as including every person from or by whom any freehold estate or interest passes in or by any deed; and the word 'grantee' as including every person to whom any such estate or interest passes in like manner." Subd. 4, sec. 4971, Stats. 1898.

Sec. 1189*b* went into effect September 1, 1898, only a little over two years after the recording of the tax deed in question. It clearly applies to this case, and establishes the plaintiff's title under the tax deed and bars the defendant as the original owner.

We find no reversible error in the record.

By the Court.—The judgment of the circuit court is affirmed.

SACKETT, Appellant, vs. PRICE COUNTY, Respondent.

January 29—February 19, 1907.

Judgments: Entry by clerk on unsigned findings: Vacation of judgment after term: Motion costs: Supreme court: Service of briefs: Penalty for delayed service.

1. The clerk entered a judgment under the mistaken impression that findings filed with him were signed by the trial judge and did not discover that they were not until after the record had been made up. There was nothing in the record to show that the court had ever passed upon the issues involved in the action or had directed the clerk to enter judgment. It further appeared that the trial court had entered an order vacating such judgment and had therein recited that the judgment was made and rendered by mistake and inadvertence and that no judgment had been ordered. *Held*, that the judgment so entered by the clerk was without authority and a nullity.
2. In such case the court had jurisdiction to vacate the judgment and expunge it from the record after the term at which it was entered.

3. In such case it further appeared that the judgment creditor had filed a transcript of the judgment docket with the county clerk after a motion had been made to vacate such judgment and stay proceedings on the part of the judgment creditor, although such motion had not then been heard or decided. *Held* that, the judgment being void, the motion and stay were proper, and no error was committed in allowing the judgment debtor costs on its motion.
4. Findings of fact and conclusions of law should be signed by the trial judge.
5. Whether a judgment should be set aside solely because the findings were not signed, in a case where it appeared without dispute that they had been made and filed by the judge and through inadvertence had not been signed, not decided.]
6. Where a party fails to serve his brief within the time prescribed he is properly chargeable with the penalty denounced by Supreme Court Rule 46.

APPEAL from orders of the circuit court for Price county: JOHN K. PARISH, Circuit Judge. *Affirmed.*

The plaintiff filed his claim with the county board for certain fees as justice of the peace, and appealed to the circuit court for *Price* county from an order disallowing it in part. In the circuit court defendant filed a formal answer to the claim and also set up a counterclaim. The action was tried without a jury during the January term, 1905, and taken under advisement. Afterwards and on July 5, 1905, a certain paper purporting to be findings of fact and conclusions of law, but without any signature of the judge, was filed with the clerk of the court, reciting in effect as facts that the allegations of the complaint were true and that the allegations of the counterclaim were not proven; and as conclusions of law that the plaintiff was entitled to recover of the defendant the amount claimed in the complaint, and ordered that judgment be entered accordingly. Afterwards and upon the 11th day of July, 1905, without any order or direction from the judge, the clerk entered judgment for $80.58 in favor of the plaintiff, with costs. On the 27th day of July, 1905, the circuit judge made an order, based upon the records and cer-

tain affidavits, requiring the plaintiff to show cause before the circuit court for Taylor county at Medford on September 5, 1905, why the judgment should not be vacated and set aside. On the 24th day of October, 1905, the plaintiff filed a transcript of the judgment, with the necessary affidavits attached thereto, in the office of the county clerk, as provided by sec. 661, Stats. 1898. The order to show cause why the judgment should not be vacated and set aside was heard on affidavits of the respective attorneys, G. E. Schwindt for plaintiff, and Arthur R. Barry for defendant, and also on that of Alex. Rasmussen, clerk of the circuit court for *Price* county, from which affidavits it appeared that there were filed with the clerk of the circuit court alleged findings of fact and conclusions of law, but that said findings were not signed by the Honorable JOHN K. PARISH, circuit judge, who tried the action, which fact was discovered on the 15th day of July, 1905, and that no findings of fact and conclusions of law signed by said judge who tried the action had been filed; that on the 27th day of June, 1905, the Honorable JOHN K. PARISH, circuit judge, entered in his minutes that the counterclaim of the defendant be dismissed and the plaintiff recover judgment as prayed for in the complaint; that on the 5th day of July, 1905, plaintiff's attorney filed what purported to be findings of fact and conclusions of law, which had not been signed by the circuit judge or by any judge, which fact had not been discovered by the clerk of the court until the 15th day of July, 1905; that through inadvertence and error the clerk of the court who entered the judgment failed to note that the alleged findings and conclusions had not been signed by any judge. Other facts appear in the affidavits not necessary to state. Upon the hearing on the order to show cause why the judgment should not be vacated, the court on the 2d day of November, 1905, vacated and set aside the judgment, and in such order recited that the judgment in said action was made and rendered by mistake and inadvertence. The

court also on the 1st day of November, 1905, on motion of defendant, made an order requiring the plaintiff, within one day after service of a copy of the order, to withdraw the transcript of the judgment docket and affidavits thereto annexed from the office of the county clerk, with $5 costs of motion, and staying all proceedings until the further order of the court. The court also on the 4th day of November, 1905, on its own motion, set aside and vacated the alleged findings and conclusions of law hereinbefore referred to. The appeal is from the three orders above referred to.

G. E. Schwindt, for the appellant.

W. K. Parkinson, district attorney, for the respondent.

KERWIN, J. 1. From the record before us we are convinced that the clerk of the court was without authority to enter judgment in the action. The alleged judgment appearing upon the record was, therefore, not the judgment of the court. There is nothing to show that the court ever passed upon the issues involved in the action or directed the clerk to enter judgment. It appears that the clerk entered the alleged judgment under the mistaken apprehension that the findings had been signed by the judge, and did not discover that they were not until after the record had been made up. It also appears from the order of the court vacating the judgment, in which it is recited that the judgment was made and rendered by mistake and inadvertence, that no judgment was ordered. So we cannot say from the record that the court ever passed upon the issues in the action or that the court ordered judgment. The clerk, therefore, had no authority to enter judgment. Sec. 2894, Stats. 1898; *Stahl v. Gotzenberger,* 45 Wis. 121; *Wadsworth v. Willard,* 22 Wis. 238. Sec. 2863, Stats. 1898, provides that "upon a trial of a question of fact by the court its decision shall be given in writing and filed with the clerk. . . ."

It is urged upon the part of appellant that the unsigned

findings filed with the clerk were a compliance with the statute. Whether a judgment would be set aside solely because the findings were not signed, in a case where it appeared without dispute that they had been made and filed by the judge and through inadvertence had not been signed, it is unnecessary to decide in this case. We think, however, that the statute clearly contemplates that the findings shall be signed. The practice of having findings signed by the judge seems to have been followed and recognized by the bench and bar as a necessary compliance with the statute. *Duncan v. Duncan,* 111 Wis. 75, 86 N. W. 562; *Harrigan v. Gilchrist,* 121 Wis. 127, 99 N. W. 909; *Fish Co. v. Young,* 127 Wis. 149, 106 N. W. 795. It is easy to see that confusion and uncertainty might result from failure of the judge to sign his findings, since in many cases it might be difficult to determine whether the findings, unsigned and appearing in the record, were the findings of the court or those prepared by counsel, or whether findings had been, in fact, passed upon by the judge. In the case before us the court obviously determined that the clerk was not authorized to enter judgment, and we cannot say from the record that he was not right in so finding. The clerk having no authority to enter the alleged judgment it was a nullity, and could be vacated and expunged from the record after as well as during the term at which it was entered. *Ætna L. Ins. Co. v. McCormick,* 20 Wis. 265; 23 Cyc. 905, 923, 924. It is well established that a judgment entered by the clerk without authority may be vacated after the term at which it was entered. 1 Black, Judgments, § 328 and cases cited; 23 Cyc. 948.

2. The order vacating and setting aside the judgment being properly entered, it necessarily followed that the defendant was entitled to have the alleged findings stricken from the record as well as the alleged transcript and affidavits filed in the office of the county clerk withdrawn. It is insisted, however, that costs should not have been imposed on

the motion to compel appellant to withdraw the transcript of the judgment docket filed with the county clerk and staying proceedings on the part of appellant. This transcript of judgment was filed after the motion to vacate the judgment had been made. The obvious purpose of such filing by appellant was to proceed with the collection of the alleged judgment. The judgment being void, the motion and stay were proper, and no error was committed in allowing respondent costs of motion.

Upon the argument our attention was called to the fact that respondent had failed to serve his brief within the time prescribed by rule of this court, and we were asked to enforce the penalty. No reason appears why the penalty should not be imposed.

The orders appealed from will be affirmed, with costs against the appellant, less $25 penalty charged against respondent as provided in Rule 46.

By the Court.—It is so ordered.

CATLIN & POWELL COMPANY, Respondent, vs. SCHUPPERT, Appellant.

January 30—February 19, 1907.

Trial: Findings, when not necessary: Foreign corporations: Right to transact business and maintain actions: Interstate commerce: Statutes: Construction: "Acquire, hold or dispose of property in this state:" "Affecting the personal liability."

1. Findings are required to cover and settle controverted questions of fact, but where a fact is established by proper stipulation between the parties, or by admissions of the pleadings, a finding on the same fact is not necessary.
2. Sec. 1770*b*, Stats. 1898, as amended by sec. 27, ch. 351, Laws of 1899, chs. 399, 434, Laws of 1901, ch. 124, Laws of 1903, and

ch. 506, Laws of 1905, provides, among other things, that foreign corporations doing business in Wisconsin shall take certain steps, and forbids any such corporation which has not complied with the statute to "transact business or acquire, hold or dispose of property in this state." The statute further provides that every contract made by or in behalf of any such foreign corporation, "affecting the personal liability thereof," or relating to property within Wisconsin, before it shall have complied with the provisions of such statute, "shall be wholly void in its behalf and on behalf of its assigns, but shall be enforceable against it or them." The defendant, a resident of Wisconsin, by letter written from Wisconsin, employed the plaintiff, a corporation residing and operating in New York, as stock broker to purchase for defendant in New York shares of the stock of a corporation foreign to Wisconsin and transmit the same to the defendant in Wisconsin, where defendant would pay through the usual collection agencies. To this the plaintiff, on its part, assented and fully performed in New York all the contract except the act of delivering the muniments of title to and collecting payment from the defendant. *Held*, that the plaintiff was entitled to recover on such contract, since the contract was without the terms of the statute and neither the transmission of the certificates of stock nor the collection of the money due the plaintiff for its services and disbursements in purchasing the shares in New York came within the terms "acquire, hold or dispose of property in this state."

3. Such words mean, not that the act of acquisition, but that the property, must be within Wisconsin.
4. In such statute the words "affecting the personal liability thereof" do not include all contracts for the breach of which the corporation would be liable in damages.
5. The words of such statute, "affecting the personal liability," used in describing one of the prohibited classes of contracts, are *held* to intend to exclude all unilateral contracts, like bills and notes, all contracts fully executed outside Wisconsin upon which there remains as obligation only payment, or payment and delivery, to be made in this state, and all contracts not by their stipulations imposing duties or liabilities on such foreign corporations.
6. In such case the transaction between plaintiff and defendant is *held* to constitute an act of commercial intercourse, and hence, as between the parties, an act of interstate commerce.
7. Certificates of stock in a corporation are mere muniments of title to the shares, which are fractional interests in the corporate property.

APPEAL from a judgment of the circuit court for Ashland county: JOHN K. PARISH, Circuit Judge. *Affirmed.*

The circuit court for Ashland county in this action made findings and rendered judgment against the appellant on an agreed statement of facts. From admissions in the pleadings and the stipulated facts it appears that plaintiff is a New York corporation carrying on in the city of New York a general commission and brokerage business and buying and selling stocks and bonds. The complaint averred that the plaintiff at the city of New York, at the request of the defendant, purchased for defendant 1,000 shares of the capital stock of the Arizona Copper Mountain Mining Company of Phœnix, Arizona, at thirty-five cents per share, and that he further agreed to pay plaintiff an additional $25 for obtaining a transfer of said stock into the name of defendant on the books of the said mining company, all of which plaintiff performed. The answer, after some admissions, contained a general denial, followed by an averment that, if any contract was entered into as averred in the complaint, the same was entered into at Glidden, Ashland county, Wisconsin, and that the plaintiff corporation was not licensed to do business within this state. By the stipulation of facts it was also agreed that the sole question in the case was: Is the plaintiff, which was not licensed under the laws of Wisconsin to do business in this state, entitled to maintain this action and recover therein? The contract was entered into by correspondence between defendant, residing at and writing from Glidden, Wisconsin, and the plaintiff, resident at and writing from New York. April 6, 1904, defendant wrote plaintiff stating that he could use 5,000 shares of said mining company stock and would pay eighteen and one-half cents per share therefor. April 8th plaintiff answered to the effect that the market was thirty cents per share. April 11th defendant wrote making an offer of thirty-five cents per share for 5,000 shares or less, and ordering the stock if sent to be forwarded to the Wisconsin State Bank

with draft attached. April 14th plaintiff wired defendant that it had secured 1,000 shares at thirty-five cents, and the same date plaintiff wrote defendant that it had bought for his account 1,000 shares of the mining stock at thirty-five cents per share and was sending the same to defendant with draft through the Glidden bank, and that if it could pick up any more of the stock for defendant it would advise him by wire. April 16th defendant wrote acknowledging receipt of plaintiff's letter of April 14th, giving some excuse for delay, and adding, "But draft will be promptly honored next week," and requesting more stock, adding, "Hope you can secure more stock." The stock with draft attached came to the Glidden bank, the indorsements of transfer were informal and not satisfactory to defendant, and he returned it to New York to the plaintiff to have the same transferred on the corporate books of the mining company into his name, offering to pay the plaintiff $25 for attending to the transfer and asking the plaintiff to get him more of the stock. The plaintiff procured the transfer of the stock on the books of the mining company to the name of defendant, returned it to the Glidden bank with draft for $375 attached, and after some further correspondence the defendant refused to pay the draft or accept the shares, on the ground that the plaintiff was an unlicensed foreign corporation. There is no proof to show the domicile of the Arizona Copper Mountain Mining Company of Arizona except what may be inferred from its name, but the shares in question had to be returned to New York in order to be transferred on its books into defendant's name. The circuit court found these facts, but failed to find the admitted fact that the plaintiff was a foreign unlicensed corporation, and did find that the plaintiff in the city of New York, at the instance and request of the defendant, purchased and obtained for the defendant said stock. Error is assigned in not finding that plaintiff was a foreign corporation which had failed to comply with the provisions of sec. 1770*b*, Stats.

1898; in finding contrary to the stipulated facts; in not finding that the contract was a Wisconsin contract; in not finding as a matter of law that defendant was entitled to judgment.

For the appellant there was a brief by *W. Stanley Smith,* attorney, and *R. Sleight,* of counsel, and a reply brief signed *R. Sleight,* attorney, and oral argument by *Mr. Sleight.*

For the respondent there was a brief by *Sanborn, Lamoreux & Pray,* attorneys, and *H. B. Walmsley,* of counsel, and oral argument by *F. B. Lamoreux.*

TIMLIN, J. Findings are required to cover and settle controverted questions of fact, but where a fact is established by proper stipulation between the parties, or by admissions of the pleadings, a finding on the same fact is not necessary. *Wilkinson v. Wilkinson,* 59 Wis. 557, 18 N. W. 527; *Sliter v. Carpenter,* 123 Wis. 578, 102 N. W. 27; *McKenzie v. Haines,* 123 Wis. 557, 102 N. W. 33. A finding that the plaintiff was a foreign corporation which had failed to comply with the requirements of sec. 1770*b*, Stats. 1898, as amended by sec. 27, ch. 351, Laws of 1899, ch. 399, Laws of 1901, ch. 434, Laws of 1901, ch. 124, Laws of 1903, and ch. 506, Laws of 1905, because of the stipulation and the condition of the pleadings was not necessary. It is contended that the findings of the court are contrary to the stipulated facts, in that the facts show a contract for the purchase of shares by the defendant from the plaintiff, while the finding is to the effect that at the defendant's request the plaintiff purchased and obtained for the defendant the shares in question. But the pleadings, together with the stipulated facts as above recited, are quite sufficient to sustain this finding. We shall therefore consider the contract as one whereby the defendant, a resident of Wisconsin, by letter written from Wisconsin, employed the plaintiff, a stockbroker residing and operating in New York, to purchase for defendant in New York 1,000 shares of the stock of a corporation foreign to Wisconsin and

transmit the same to the defendant in Wisconsin, where defendant would pay through the usual collection agencies, and that the plaintiff, on its part, assented to and fully performed in New York all the contract except the act of delivering the muniments of title to and collecting payment from the defendant. Sec. 1770*b*, Stats. 1898, amended as above indicated, provides in the last amendment (ch. 506, Laws of 1905) a very complete plan for the regulation of foreign corporations doing business in this state, by requiring each to file with the secretary of state a copy of its charter and the amendments thereunto authenticated as there prescribed, together with certain sworn statements, and that such corporation shall appoint the secretary of state its attorney in fact upon whom service of summons, notices, and process may be made so as to be effectual against the corporation.

Such foreign corporations are by this statute forbidden to "transact business or acquire, hold or dispose of property in this state" until they have complied with the foregoing requirements. The foreign corporation must also, "as a condition of its being permitted to begin or continue doing business within this state, comply with all the laws of the state with regard to foreign corporations." Id. The failure to comply with these provisions of law subjects the foreign corporation to a penalty of $500. This statute also provides:

"Every contract made by or on behalf of any such foreign corporation, affecting the personal liability thereof or relating to property within this state, before it shall have complied with the provisions of this section, shall be wholly void in its behalf and on behalf of its assigns, but shall be enforceable against it or them."

This statute has been before the court in *Ashland L. Co. v. Detroit S. Co.* 114 Wis. 66, 89 N. W. 904; *Chicago T. & T. Co. v. Bashford,* 120 Wis. 281, 97 N. W. 940; *Beaser v. Barber A. P. Co.* 120 Wis. 599, 98 N. W. 525; *Greek-Am. S. Co. v. Richardson D. Co.* 124 Wis. 469, 102 N. W. 888;

Presbyterian M. Fund v. Thomas, 126 Wis. 281, 105 N. W. 801; *Chickering-Chase Bros. Co. v. White,* 127 Wis. 83, 106 N. W. 797; *Allen v. Milwaukee,* 128 Wis. 678, 106 N. W. 1099. In these cases the statute was applied to a variety of conditions and its general validity sustained. In this case the contractual assent of the plaintiff and its acts in performance of the contract thereby created having been, as we have seen, wholly without the state, merely sending into this state to deliver the muniment of title or to collect the money due from the performance and execution in New York is not transacting business in this state within the meaning of this statute. The assent of the plaintiff and the acts of performance by it were in a place where this statute had no force—beyond the territory in which the statute had the force of law. The stock certificate was transmitted to this state for delivery, but this certificate is a mere muniment of title to the shares, which are fractional interests in the corporate property of the mining company situate outside of this state; and neither such transmission nor the collection of the money due the plaintiff for its services and disbursements in purchasing the shares in New York could be considered to fairly come within the terms "acquire, hold or dispose of property in this state." These words mean, not that the act of acquisition, but that the property, must be within this state, because the act of acquisition is sufficiently covered by the prohibition against transacting business. The transaction in question was then one which was outside of the terms of the statute mentioned.

Coming now to the mandate of this statute relating to the invalidity of contracts made by or in behalf of such unlicensed foreign corporation, it is noticeable that not all contracts so made are void, but only those "affecting the personal liability thereof," or those not coming within this limitation but which relate to property within this state. It is contended that the words "affecting the personal liability thereof" include all contracts for the breach of which the corporation

would be liable in damages or otherwise. This construction is not permissible, first, because this would include all contracts whatsoever, and the manifest intention of the statute is to include only contracts coming within one or the other of its disjunctive descriptive terms; second, because this would render the words "or relating to property within this state" surplusage and without weight or significance, because such contracts would have been already covered by the prior clause, "affecting the personal liability thereof," if we should give such construction to this clause as to include all contracts whatsoever. We are forbidden by familiar rules of interpretation to treat any word, phrase, or clause as meaningless or surplusage, unless, indeed, there is no escape from such conclusion. The legislature in making this law may be presumed to have selected these words to harmonize with the prohibition in the same law against transacting business and also with a view to the limitations on its own powers growing out of federal control over interstate commerce. *Cooper Mfg. Co. v. Ferguson,* 113 U. S. 727. The prohibition against transacting business may, when a proper case arises, be held to be broader than one merely directed against carrying on business within the state, but that question is not involved in the determination of this case. But in all cases like the instant case, not coming within the prohibition against transacting business and sought to be brought within the clause now under consideration and declaring the contract void, the words "affecting the personal liability," used in describing one of the prohibited classes of contracts, must be held intended to exclude all unilateral contracts, like bills and notes, all contracts fully executed outside of this state upon which there remains as obligation only payment, or payment and delivery, to be made in this state, and all contracts not by their stipulations imposing duties or liabilities on such foreign corporation. Because the contract in question was not, so far as it was made or took effect in this state, one affecting the per-

sonal liability of the plaintiff by any covenant or stipulation therein contained, and was wholly executed by the plaintiff in New York, and because it did not relate to property within this state, and did not constitute, on the part of the corporation, a transaction of business in this state, the plaintiff was entitled to recover thereon within the terms of the statute in question. A majority of the court are also of the opinion that the transaction between the plaintiff and defendant constituted an act of commercial intercourse; hence, as between these parties residing where they did, an act of interstate commerce within the doctrine of *Gibbons v. Ogden,* 9 Wheat. 1, 190, and *Passenger Cases,* 7 How. 283–573, 4 Rose's Notes, 709–717.

By the Court.—The judgment of the circuit court is affirmed.

MAXCY, Appellant, vs. SIMONSON and others, Respondents.
SIMONSON, Respondent, vs. MAXCY, imp., Appellant.

January 30—February 19, 1907.

Tax titles: Sales to prohibited officers: Evidence: Findings: Purchase of tax certificates or tax title from county: Sales at discount: Right of tax-title claimant to face of tax certificate and interest.

1. A conveyance of a tax title by the county is not to be held void within the prohibitions of sec. 1143, Stats. 1898 (providing that certain county officers shall not make any purchase, directly or indirectly, of any tax certificate or tax title held by the county), because a deputy county treasurer was interested in making the sale, where the court on sufficient evidence has found that such officer was not interested in the purchase.
2. In an action by the original owner to quiet title as against a tax-title claimant it is not error, under the provisions of sec. 1210*h*, Stats. 1898, to require the original owner to pay the face value of the tax certificates and interest from the time the tax-title claimant acquired them, or from the time he received conveyance from the county of the title acquired by the county

under them. It is not the purpose of the statute to enable the original owner to escape paying a portion of his taxes by reason of the county having sold its tax certificates at less than their face value.

3. Under sec. 1210*h*, Stats. 1898, in an action to set aside a tax deed, the court adjudged that the tax deed was void, that the original owner be barred unless within the time allowed he pay into court, for the use of the tax-title claimant, the face of the tax certificate on which the deed was based and the face of all subsequent tax certificates, with interest, and upon such payment that the title to the lands in question be established in the original owner, and awarded a judgment for costs in favor of the tax-title claimant. *Held*, that the judgment for costs was premature and erroneous.

APPEAL from a judgment of the circuit court for Bayfield county: JOHN K. PARISH, Circuit Judge. *Reversed.*

It appears from the record and is undisputed that two actions were commenced by the respective parties on or about May 1, 1902, and after issues were joined therein they were consolidated into one action and tried together. Action No. 1 was commenced by *Maxcy*, as owner in fee of the premises described, against *Simonson, Sowder,* and *Axelberg* to quiet title pursuant to sec. 3186, Stats. 1898. The defendant *Simonson* separately answered in that action, claiming title under a tax deed to the county executed May 11, 1900, for the taxes of 1895 and sale of 1896, which tax deed was recorded May 11, 1900, and a quitclaim deed to him from the county, recorded September 17, 1900, and also under a tax deed issued to *Simonson* March 5, 1902, and recorded March 6, 1902, for the taxes of 1896 and sale of 1897, and that *Simonson* also held certain tax certificates on the sale of the lands for the taxes of the years 1897, 1898, and 1899. The defendants *Sowder* and *Axelberg* separately answered by way of a general denial and asked that the action be dismissed with costs as to him. The other action, No. 2, was commenced on or about May 1, 1902, by *Simonson* as owner and holder of such tax deeds and certificates and quitclaim deed,

against said *Maxcy*, claiming title under the original owner and against said *Sowder* and *Axelberg*, who were brought into the case by order of the court for the purpose of barring them and all persons claiming under them of all right, title, interest, or claim in or to said lands or any part thereof, pursuant to secs. 1197–1210, inclusive, Stats. 1898. The defendant *Maxcy* separately answered in that action, claiming title under the original owner, and alleging that the quitclaim deed from the county to *Simonson* was illegal and void for the reason that *Axelberg* was deputy county treasurer and an interested party in the lands and said purchase of the same, contrary to the statute in such case made and provided; that *Axelberg* was still one of the owners of said lands, and that he and *Sowder* held the title to the same in the name of *Simonson*. *Maxcy* also alleged in said answer that said tax deeds, respectively, were illegal and void for several reasons stated in said answer. By way of counterclaim said *Maxcy* alleged that he was the owner in fee simple of the premises described and in actual possession and occupancy thereof; prayed judgment that such tax deeds and tax certificates should be adjudged null and void and that *Simonson* take nothing by his action, and for costs; that his claim be established as against the claim of *Simonson;* that *Simonson* be forever barred from having or claiming any right or title to said lands adverse to said *Maxcy*, and that *Simonson* be adjudged to release to *Maxcy* all claim to said lands and pay the costs of the action. *Simonson* replied, denying each and every allegation of such counterclaim. *Sowder* and *Axelberg* separately answered to the effect that they made no claim to the lands described in the complaint of *Simonson*, and put in a general denial of the allegations therein contained.

The two actions being so at issue and consolidated and tried as one action, the court at the close of the trial found as matters of fact, in effect, (1) that all the allegations of *Simonson's* complaint are proven and true and all the allega-

tions of his answer are proven and true; (2) that all the allegations of the answers of *Sowder* and *Axelberg* are proven and true; (3) that *Maxcy* is the owner of the original title of the lands described; (4) that *Simonson* claims title to said lands under and by virtue of said two tax deeds and said tax certificates; (5) that the tax deed of May 11, 1900, was based on the taxes of 1895 and the tax certificates on the sale of 1896, aggregating $85.11, and recorded as mentioned; (6) that the tax certificates for the taxes of 1896 and sale of 1897 amounted in the aggregate to $44.44, for the taxes of 1897 and sale of 1898 amounted in the aggregate to $48.61, for the taxes of 1898 for the sale of 1899 amounted in the aggregate to $60.25, and for the taxes of 1899 for the sale of 1900 amounted in the aggregate to $56.92; (7) that September 1, 1900, all of said tax certificates were for value duly sold, assigned, and transferred to *Simonson;* (8) that the tax deed of March 5, 1902, was based on the tax certificates of the sale of 1897, in the aggregate $44.44, and was recorded as mentioned; (9) that *Simonson* is now, and ever since said assignment of said certificates to him as mentioned has been, the lawful owner and holder of the same, except the certificates on the sale of 1897, in which the second tax deed was issued; (10) that after the execution of the first tax deed and on September 17, 1900, the county by quitclaim deed conveyed the lands described to *Simonson* and the same was recorded as mentioned; (11) that both of said tax deeds and all of said tax certificates are illegal and void for errors and irregularities not going to the groundwork of the tax on which the same were based; (12) that all the allegations in both the complaint and answer of *Maxcy* are unproven and untrue, except in relation to the illegality of said tax deeds for errors and irregularities not going to the groundwork of the tax on which the same were based; (13) that due notice of the pendency of the action commenced by *Simonson* was filed May 26, 1902.

As conclusions of law the court found, in effect, (1) that *Simonson* is entitled to judgment against *Maxcy,* and that *Maxcy* and all persons claiming under him since filing the notice of *lis pendens* be barred of all right, title, interest, or claim in or to the lands described, *unless* said *Maxcy* pay into court for the use of *Simonson,* within thirty days from service of notice of the entry of these findings, the amount of the tax certificates upon which the first tax deed was based, with interest thereon from September 17, 1900, at the rate of fifteen per cent. per annum until paid, and also the total and aggregate amount of all said tax certificates so assigned to said *Simonson* by the county, with interest thereon at the rate of fifteen per cent. per annum from September 1, 1900, until said money is so paid; (2) that upon payment of said sum by *Maxcy* all right and title in said lands be established in said *Maxcy;* (3) that *Simonson, Axelberg,* and *Sowder* are severally entitled to their costs and disbursements herein against *Maxcy.*

Thereupon, and on motion of *Simonson's* attorney and pursuant to such findings of fact and conclusions of law, judgment was entered by the clerk, wherein it is ordered and adjudged, in effect, (1) that *Maxcy* and all persons claiming under him since May 26, 1902, be barred of all right, title, interest, or claim in and to said lands or any part thereof, *unless Maxcy* pay into court for the use of *Simonson,* within thirty days from the entry and notice of the findings, the said sum of $85.11, with interest thereon from September 17, 1900, at fifteen per cent. per annum until so paid, also the total and aggregate amount of all said tax certificates, amounting to $210.02, with interest thereon from September 1, 1900, until said money be so paid; (2) that upon the payment of said sums by *Maxcy* all right and title in and to said lands be established in *Maxcy;* (3) that *Simonson* do have and recover of *Maxcy* his costs and disbursements taxed at $98.41. It is therein further ordered and adjudged that *Axelberg* and

Sowder, respectively, do have and recover of *Maxcy* his costs and disbursements in this action taxed at the sum of ——— dollars, but the same were not taxed.

From such judgment so entered by the clerk *Maxcy* appeals.

A. W. McLeod, for the appellant.

John Walsh, for the respondents.

CASSODAY, C. J. 1. It is claimed that the sale from the county to *Simonson* was void because the deputy county treasurer, *Axelberg,* was interested in making the sale. This contention is based upon the statute which prohibited such deputy from making any purchase, directly or indirectly, at any tax sale, or to purchase any tax certificate or tax title held by the county. Sec. 1143, Stats. 1898. It is enough to say that the trial court found that *Axelberg* was not so interested in making such purchase, and the evidence is sufficient to support such finding.

2. It is claimed by counsel that the amount which the court required *Maxcy* to pay into court as a condition of relief from the tax deed and tax certificates held by *Simonson* was excessive and not authorized by the statute. It was found by the court and conceded by counsel that the tax deed was illegal and void for errors and irregularities not going to the groundwork of the tax on which the same was based. Both parties cite and apparently rely upon the same section of the statute (sec. 1210*h,* Stats. 1898). The portion of that section applicable to this case states that the party claiming under the original title, "if he show himself otherwise entitled to judgment, shall, *before* the entry thereof, within a reasonable time to be fixed by the court, pay into court for the person or persons claiming under such tax sale *or* tax certificate the amount for which such land *was sold, and the amount paid* by such person or persons *for taxes levied* upon the premises *subsequent* to such sale, with interest on *all such*

amounts at the rate of fifteen per cent. per annum from the *times* of payment until the said money *be so paid into court;* and in default of such payment within the time so fixed the defendant [tax-title claimant] shall have judgment in the action." Counsel on each side cite and seemingly rely on *Blackman v. Arnold,* 113 Wis. 487, 492, 493, 89 N. W. 513, in support of their construction of the language quoted. In that case the land was sold May 15, 1894, for delinquent taxes of 1893, and was bid in by the county at the tax sale. On January 6, 1895, the tax certificate given on that sale was purchased by and delivered "to Webb on payment of the *face amount* of such certificate." The only controversy in that case was whether the defendant, claiming title under the original owner through the foreclosure sale, was required by the statute quoted "to pay interest on the amount of the 1894 certificate from its date, May 15, 1894, instead of from the time Webb paid the county therefor, January 6, 1895, the excess being $9.95," and it was held that the interest should be reckoned from said last-mentioned date. In the case at bar the original owner of the lands failed to pay the taxes assessed thereon for the years 1896, 1897, 1898, and 1899, and they were sold in due course to Bayfield county; and the certificates on such sales were duly assigned and transferred by the county to *Simonson* September 1, 1900. In harmony with the ruling of the court in *Blackman v. Arnold, supra,* the trial court, as one of the conditions of relief, required *Maxcy* to pay into court for the use of *Simonson* the total and aggregate amount of all of said tax certificates so assigned to *Simonson,* "with interest thereon at the rate of fifteen per cent. per annum *from the date of such assignments,* September 1, 1900, until said money be so paid." And so the trial court, as one of the conditions of relief from said tax deed and tax certificates, required *Maxcy* to pay into court for the use of *Simonson* the amount of the tax certificates upon which said first tax deed was based, together with interest thereon

at fifteen per cent. per annum from the time *Simonson* procured a quitclaim deed from the county, September 17, 1900, until said money be so paid. The correctness of such requirement as to the tax deed seems to be conceded. The contention is that *Maxcy* should only have been required to pay into court, as a condition of relief from said tax deed and tax certificates, $100, which was the amount which *Simonson* paid the county for the quitclaim deed September 17, 1900, and interest thereon at the rate of fifteen per cent. per annum from that date to the time of payment. No authority is cited on either side of the question so presented. The language of the statute quoted furnishes some plausibility to the contention. As indicated, the requirement to "pay into court," in case a tax deed has been taken, "the amount for which such land was sold," manifestly refers to the tax sale and the amount for which the tax certificate was issued, with interest as stated in the statute; and that is so even where the land has been bid in by the county and no money has in fact been paid. So it is manifest that such interest is to be added to "the amount paid . . . for taxes levied . . . subsequent to such sale . . . from the times of payment until the said money be so paid into court." The same is true as to the purchase of tax certificates of sale at their face value, as in *Blackman v. Arnold,* 113 Wis. 487, 89 N. W. 513. The question that here confronts us is whether the same is true where tax certificates are purchased at a discount, as in the case at bar. In view of the fact that the amount of the tax is never anything more than a very small per cent. of the value of the property upon which it has been assessed, can it be assumed that in enacting the statute in question the legislature had in contemplation that tax certificates would be sold for less than their face value? This court held long ago that the performance of an agreement by a county to sell its tax certificates for an exceedingly low and nominal value might be enjoined at the suit of a taxpayer of

the county. *Willard v. Comstock,* 58 Wis. 565. See *Webster v. Douglas Co.* 102 Wis. 181, 189, and cases there cited. Had the owner of the lands in question attempted to redeem the same, he would, of course, have been compelled to pay the full face value of such tax certificates, with interest at the rate mentioned from the respective dates of such certificates. Sec. 1165, Stats. 1898. The manifest purpose of the statute in question is to secure the early payment of taxes by the owners of lands, and to compel those who neglect paying their taxes to proceed with promptness in case they desire to contest the validity of such tax sales. It certainly was not the purpose of the statutes to enable such owners to escape paying a portion of their taxes by reason of the county having sold its tax certificates at less than their face value. We find no error in the findings of fact in the particulars mentioned.

3. Error is assigned because the judgment entered by the clerk of the court adjudges costs and disbursements against *Maxcy* and in favor of the other parties, which costs and disbursements are taxed in favor of *Simonson* at $98.41. Such judgment is conditional and certainly premature and erroneous. The statute quoted expressly required that the moneys to be paid into court should be so paid "before the entry" of judgment in favor of the original owner; "and in default of such payment within the time so fixed the defendant [tax-title claimant] shall have judgment in the action." Thus it appears that the character of the judgment to be entered and the party in whose favor the same is to be entered depend upon whether the required amounts shall be so paid into court—a fact which the record fails to disclose has been determined. The findings and judgment seem to have substantially disposed of the merits, but they left a "condition to be performed in order fully to determine the rights of the parties," and hence the judgment was, at most, merely interlocutory. Sec. 2883, Stats. 1898. The proceedings in such cases are quite similar to those in ejectment under sec. 3087,

Stats. 1898, where tax titles are defective. One of the consolidated actions was brought by the landowner to quiet title pursuant to sec. 3186 of the Statutes. Had he substantiated his title under that section he would have been entitled to costs, because none of the defendants therein "disclaimed all title to such land" nor gave any "release thereof." Besides, such tax deed and all of said tax certificates were held to be illegal and void, and so the tax-title claimant failed. We must hold that the judgment so awarding costs is erroneous and contrary to the statutes in the particulars mentioned.

No other question requires consideration.

By the Court.—The judgment of the circuit court is reversed, and the cause is remanded for further proceedings according to law.

ODEGARD, Respondent, vs. NORTH WISCONSIN LUMBER COMPANY, Appellant.

January 30—February 19, 1907.

Venue: Prejudice of judge: Change of place of trial: Calling in another judge: Jurisdiction: Costs of former trials: Failure to pay: Stay of action: Discretion: Negligence: Personal injuries: Master and servant: Notice of injury: Failure to serve: Commencement of action within one year: Dismissal: Subsequent action: Statutes: Pleading: Variance: Evidence: Admissibility: Witnesses: Hypothetical questions: Appeal and error: Assignment of error: Trial: Examination of witnesses: Champertous agreement: Special verdict: Form of questions: Rules of court: Reasonableness: Validity: Refusal of requests for instructions: Instructions to jury: Proximate cause: Prejudicial error: Excessive damages.

1. At the time an action was commenced in the circuit court for S. county that county had two terms a year, one commencing in June and the other in November. The action was not triable at the June term and, before the commencement of the following November term, the defendant interposed an affidavit alleging prejudice of the presiding judge and also a motion for a

stay of proceedings until plaintiff paid certain costs. Thereupon the presiding judge called in another circuit judge, who, on a date before the commencement of the November term, attended and heard the motion and continued the same for further hearing, but ordered that in the meantime the plaintiff's proceedings be stayed, so far as moving the cause for trial at the coming November term, until such costs were paid. The costs were not paid, and subsequently an order was entered vacating the temporary stay and authorizing the plaintiff to notice the cause for trial at the succeeding June term, which was accordingly done. On the last day of the November term defendant appeared and moved that the cause be sent to another county, which motion was denied, and the cause was tried at the June term for which it had been noticed for trial. Sec. 2625, Stats. 1898, as amended by ch. 101, Laws of 1901, and ch. 282, Laws of 1905, provides that the court shall change the place of trial of any action or special proceedings on the application of a party thereto who shall file his affidavit alleging prejudice of the presiding judge, but that in lieu of granting such application the judge may in his discretion retain the action or proceedings in the same court "until the last day of the then current term if the application is made at a term at which the action is triable, or the next term if it is made in vacation, and in the meantime shall call upon some other judge or judges to attend and hold court during such current or next term for the purpose of exercising jurisdiction in all actions or proceedings in which applications for change of the place of trial have been made for such reason. And while so in attendance said judge may make all orders and hear all applications and motions that may be brought on for hearing during the time he shall attend. If such other judge or judges (as may be necessary or convenient) can so attend and hold court for such purpose at either such terms, the same shall be done with the same effect as if a change of venue to another circuit and a trial of such action or proceeding had been had therein; *but if no such judge shall so attend*, an order for a change of the place of trial shall be entered in each such action and proceeding, wherein proper application has been made, on the last day of such term, and thereupon such change shall be made." *Held:*

(1) The purpose of the statute is to secure to the party making the required affidavit not only an unprejudiced trial, but a trial in the home circuit, provided a competent judge seasonably attends, and at the same time to secure both parties against a long delay.

(2) The statute contemplates that there shall always be one

term at which the cause can be tried in the home circuit, and that such term shall be a term at which the cause is in a situation to be moved peremptorily for trial.

(3) The cause can be sent from the circuit only after the lapse of a term at which it could be tried.

(4) The presiding judge calls in another judge for the purpose of *exercising jurisdiction*, and not alone for the purpose of trying the cause.

(5) When the "other judge" held court and heard and passed upon the motions, he did "so attend" within the meaning of the statute, and hence, under the provision "if no judge shall so attend," it was not error to refuse to change the place of trial on the last day of the November term.

(6) The action was properly triable in S. county at the June term at which it was tried.

2. As a general rule, where a plaintiff has been nonsuited and brings a second action for the same cause, a presumption arises either that the second action is vexatious or that the cause of action is without merit, and hence a court will not allow the plaintiff to proceed with the second action until he has paid the costs of the first.
3. Such presumption, however, yields to proof showing that the prosecution of the second action is in good faith, and that the failure of the previous action was not due to infirmity in the cause of action, but to untoward circumstances or excusable mistake.
4. When in connection with such proof it appears that the plaintiff is absolutely unable to pay the previous costs on account of poverty or want of credit, a case arises where the court in the exercise of a wise and just discretion may fairly allow the second action to proceed notwithstanding the fact that the previous costs are unpaid.
5. Courts are open to the prosecution of meritorious and *bona fide* causes of action in good faith, and poverty, while it gives no license to any one to vex or harass his neighbor with unfounded lawsuits, alone should not prevent a needy litigant who presents a meritorious cause of action from invoking the courts to do justice between himself and his neighbor.
6. Under the facts, stated in the opinion, it is *held* there was no abuse of discretion in denying a motion to stay proceedings in an action until the costs of two previous actions, founded on the same cause of action, had been paid.
7. Under sec. 4222, Stats. 1898, as amended by ch. 307, Laws of 1899 (providing that, when an action shall be brought and a complaint actually served therein within one year after the

happening of the event causing such damages, the notice therein provided need not be served), no notice is necessary where the plaintiff had brought an action within one year after the happening of the event causing such damages, wherein he was nonsuited, although the instant suit for the same cause of action was begun more than one year after the event causing the damages.

8. Under such statute it is not essential that the previous complaint should have alleged the same ground of negligence as that upon which recovery in the subsequent action is obtained.

9. In an action by a servant for injuries from the defective operation of machinery it is not necessary that the servant, at his peril, ascertain the initial cause of the defective operation and set it forth in his pleading. It is sufficient, as against demurrer or objection upon the trial, if he describe the machine and its operation and allege the ultimate fact that the machine was defective in that it was not at the time subject to control by the means employed as it should have been, and that thereby it became uncontrollable, and that the accident resulted from such want of control, although the pleading may be subject to a motion to make it more definite and certain.

10. In an action by a servant for injuries from the defective operation of machinery the plaintiff alleged one specific fact which he claimed was a cause of the uncontrollability, but he also alleged that there were other defects unknown to him. *Held*, that such allegations were sufficient to entitle plaintiff to introduce evidence of defective construction in any respect which was shown to be effective to produce the uncontrollable condition.

11. In an action by a servant for injuries from the defective operation of a machine, evidence that at the time of the trial the machine "worked nice and smooth" is inadmissible, where it appeared there had been material changes in the machine between the time of the accident and that of the trial.

12. In such case, however, evidence that the machine did not work perfectly and bothered at times before the changes is *held* admissible.

13. Objection to a hypothetical question because assuming facts not supported by the evidence is not tenable where there is some evidence of the facts assumed.

14. Where counsel have not specified in what respect a hypothetical question fails to correspond to facts in evidence, an assignment of error thereon will not be considered.

15. In an action by a servant for injuries while working on a saw carriage operated by steam, alleged to have been caused by the

fact that the operation of the carriage was not readily controllable, it is *held* to have been error to exclude expert evidence offered by defendant that it was a physical impossibility for the difference in the size of the exhaust pipe and the supply pipe to affect the working of the valve controlling the carriage; that the difference would have no effect upon the accumulation of water; that the valve in use on the apparatus was in general use in Wisconsin and this section of the country; that such valve was manufactured and supplied by reputable makers of sawmill machinery; as to the effect of the running of the carriage against the bumper on the movement of the plug in the valve; as to the effect of water in the valve on the movement of the sawyer's lever; whether it was possible for the valve to reverse without movement of the lever; whether a certain six-inch pipe was in accordance with the usual construction; and whether it was physically possible for the carriage to run back after striking the bumper without movement of the sawyer's lever.

16. Where, in an action for injuries to a servant, the plaintiff was placed on the stand as an adverse witness and produced a written agreement with his attorneys, which contained nothing of a champertous nature, and twice denied that he had any agreement except the written one, the court was *held* justified in excluding any further examination of plaintiff on that subject.

17. In an action by a servant for injuries, plaintiff alleged the defective operation of a steam sawmill carriage and also the incompetence of defendant's engineer in charge of the carriage at the time of the accident. *Held*, under the evidence, stated in the opinion, that the questions whether the alleged defective operation of the steam valve was not in part the cause of the engineer's failure to seasonably reverse the lever controlling the machinery; whether the engineer was incompetent; whether such incompetence was known or should have been known to defendant, and whether the accident was either wholly or partially the result of such incompetence, were proper questions to submit to the jury, and that it was not error to refuse to direct a verdict in favor of defendant on the ground that no negligence was shown, or that, if negligence was shown, it was not the proximate cause of the injury.

18. In an action by a servant for injuries alleged to have been caused, in part, by the incompetence of defendant's engineer, a question submitted as part of the special verdict asked whether the injury was caused by the incompetence or *want of skill* of the engineer. *Held*, that the sole inquiry in this respect was whether the injury was proximately caused by the *incompe-*

tence of the engineer, and that the question should be so framed as to put that inquiry only.

19. In such case, if the words "want of skill" meant incompetence they were surplusage; if they meant something different then they were not only immaterial but made the question double.

20. An inquiry in a question of a special verdict as to whether defendant "knew or ought to have known" presents an inquiry as to two separate facts.

[21. Whether questions of a special verdict inquiring whether defendant knew or ought to have known certain facts are defective for duplicity, not decided.]

22. In submitting a question of a special verdict the court inquired whether a majority of the millowners under the same circumstances should have reasonably foreseen that an engineer's incompetence would be likely to cause an injury to *plaintiff*. *Held*, that the question was inaccurate, since it was only necessary to inquire whether the engineer's incompetence would be likely to cause injury to *another*.

23. A rule of court in order to be valid must be reasonable.

24. The right to present instructions applicable to the case and have them given to the jury if they state the law correctly is an ancient right, recognized and guaranteed by sec. 2853, Stats. 1898, subject to the limitation that they must be in writing.

25. A rule of court which substantially impairs such right in requiring that a party must submit his requests for instructions to the jury in writing before he shall first rest his case, and that he shall cite the authorities upon which he relies to support each proposition or the court will not consider such request, substantially impairs the right to present instructions, recognized and guaranteed by sec. 2853, Stats. 1898, is unreasonable, and hence void.

26. In an action for injuries to a servant alleged to have been caused by the defective operation of a machine and also, in part, by the negligence of an incompetent engineer, requests for instructions, stated in the opinion, as to the rules by which the jury were to determine the question of the competence of the engineer and the question of the plaintiff's contributory negligence, and as to the burden of proof, are *held* to state correct legal principles applicable to the case and not covered by the general charge.

27. In such case a requested instruction that the jury could not find the engineer incompetent from the fact that he might have been guilty of one *or more* isolated acts of negligence is *held* too broad a statement. Proof of a single act of negligence is not sufficient to raise an inference of incompetence, while proof of many such acts may.

28. Where a special verdict is taken it is not error to refuse to give a requested instruction containing a substantially correct statement of the law, but which is general and does not apply to any question of the special verdict.
29. In an action by a servant for injuries the court instructed the jury that proximate cause was the immediate, direct, actual, natural, efficient, and real cause. *Held* inaccurate, but not prejudicial to defendant, since it placed a heavier burden on the plaintiff than the correct rule.
30. In such case the inaccuracy was not prejudicial, since the jury, in answer to specific questions of the special verdict, had found all the elements of fact constituting proximate cause.
31. In an action by a servant for the loss of his leg, under the facts, stated in the opinion, a verdict for $8,500 is *held* not to be excessive.

APPEAL from a judgment of the circuit court for Sawyer county: W. C. SILVERTHORN, Judge. *Reversed.*

This is an action to recover damages for personal injuries sustained by plaintiff April 21, 1902, while employed in defendant's sawmill at Hayward, Wisconsin. On the day named the plaintiff was working as a rider upon one of the saw carriages in the mill, which carriage was operated by means of what is known as a steam feed, which lets steam into a long cylinder in which a piston works, which is attached to the carriage and propels it very rapidly forward and back past a band saw, thus sawing lumber from a log or cant fixed upon the carriage. The head sawyer operates the carriage by means of a lever which moves a valve in the steam-feed apparatus and lets in or shuts off the steam. Just prior to the accident the sawyer, one Magnuson, called the engineer, Lee, and stated that the feed was working hard. After finishing the sawing of the log then on the carriage the sawyer stepped aside and Lee took hold of the lever and ran the carriage back and forth a few times, apparently without difficulty, and the sawyer told him to open the valve wide and he would feel it. The plaintiff meanwhile remained on the carriage. Lee then opened the valve wide and the carriage started rapidly past the saw. Lee failed to reverse the lever in time and the car-

riage bumped against the bumper, the plaintiff was thrown down on the carriage, which at once started rapidly back, and plaintiff's leg, which was projecting over the edge of the carriage, was sawed off below the knee as the carriage passed the saw. The sawyer grabbed the lever as the carriage passed the saw and stopped the carriage. The plaintiff's claim was that the steam-feed apparatus was defective in that the pipe conducting the exhaust steam away from the valve, called the port pipe, was too small, and that there were other defects of which he was ignorant but which the plaintiff well knew, causing the carriage to jerk or stick. He also claimed that Lee was an incompetent engineer and known to be so by defendant, and that the accident was the combined result of the defects in the apparatus and the incompetence of Lee. The jury returned a special verdict as follows:

"(1) Was the *North Wisconsin Lumber Company,* the defendant, at the time mentioned in the complaint in this action, a corporation existing under the laws of the state of Wisconsin? *A.* (by the court) Yes. (2) Was the said *North Wisconsin Lumber Company,* on April 21, 1902, the owner of and engaged in operating a sawmill at Hayward, Wisconsin? *A.* (by the court) Yes. (3) Was the plaintiff, *Ole Odegard,* on said 21st day of April, 1902, as an employee of the defendant, the *North Wisconsin Lumber Company,* engaged in its service in the work of riding upon the log carriage in the said mill while the same was in operation in the manufacture of lumber? *A.* Yes. (4) Was the said *Ole Odegard,* while so engaged on that day, thrown down upon the said carriage in such a way that as the carriage was impelled toward the band saw his left leg was cut off by said saw a short distance below the knee? *A.* Yes. (5) Did any want of ordinary care on the part of the plaintiff, *Ole Odegard,* contribute to produce his injury? *A.* No. (6) Was said Reodor Lee a competent engineer at the time of the accident by which the plaintiff *Odegard* lost his leg? *A.* No. (7) If said Reodor Lee was an incompetent engineer at the time of the accident by which *Ole Odegard* lost his leg, did the *North Wisconsin Lumber Company* know, or ought it

reasonably to have known, prior to the accident aforesaid that said Reodor Lee was incompetent. *A.* Yes. (8) Was the said injury to the plaintiff, *Ole Odegard,* caused by the incompetence or want of skill as an engineer on the part of said Reodor Lee? *A.* Yes. (9) Did the defendant, the *North Wisconsin Lumber Company,* furnish its employee, said *Ole Odegard,* at the time of the accident, in the said steam-feed apparatus which moved the carriage upon which he was riding, a reasonably safe appliance for the work in which he was engaged? *A.* No. (10) If the said steam-feed apparatus was not a reasonably safe appliance for the work in which said *Odegard* was engaged at the time he lost his leg, did the defendant, the *North Wisconsin Lumber Company,* know, or ought it reasonably to have known, prior to the said accident, that the said steam-feed apparatus was not a reasonably safe appliance for the work in which said *Odegard* was engaged when the accident occurred? *A.* Yes. (11) Would the majority of millowners and superintendents, under the circumstances of the situation in which *Odegard* was placed at the time of the accident, have reasonably expected and foreseen that the said steam-feed apparatus would be likely to cause an injury to the plaintiff, *Odegard,* by reason of the condition in which it then was? *A.* Yes. (12) Would the majority of millowners and superintendents, under the circumstances of the situation in which *Odegard* was placed at the time of the accident, have reasonably expected and foreseen that Reodor Lee would be likely to cause injury to the plaintiff, *Odegard,* by reason of the incompetency as an engineer of the said Reodor Lee? *A.* Yes. (13) Was the danger to be apprehended from riding the carriage in question at the time of the accident so great, immediate, and constant that a reasonably prudent person, under all the circumstances in which *Odegard* was then placed and acted, would not subject himself to it? *A.* No. (14) Was the defendant guilty of negligence in failing to furnish the plaintiff a reasonably safe appliance in the said steam-feed apparatus with which to do his work? *A.* Yes. (15) If you answer the last question 'Yes,' then was such negligence of the defendant the proximate cause of the injury? *A.* Yes. (16) What damages has the plaintiff, *Odegard,* sustained by reason of his said injury? *A.* $8,500."

Judgment for the plaintiff was rendered on this verdict, and the defendant appeals.

For the appellant there was a brief by *Bundy & Wilcox,* attorneys, and *Wickham & Farr,* of counsel, and oral argument by *R. P. Wilcox* and *James Wickham.*

For the respondent there was a brief by *Frank B. Lamoreux, Sam. J. Williams,* and *H. B. Walmsley,* and a supplemental brief signed *Sanborn, Lamoreux & Pray, Sam. J. Williams,* and *H. B. Walmsley,* and oral argument by *Mr. Walmsley* and *Mr. Lamoreux.*

WINSLOW, J. A question of jurisdiction arises at the threshold of the case which must be first examined.

The action was commenced in Sawyer county. This county at that time had two terms a year, one commencing on the first Monday in June and the other on the second Monday in November. The summons was served June 11, 1904, and hence the action was not triable at the June term. The answer was served in August following. On the 6th day of October, 1904, an affidavit alleging prejudice of the presiding judge was filed by the defendant, and at the same time an order to show cause, returnable October 17th, was obtained and filed, requiring the plaintiff to show cause why all further proceedings in the action should not be stayed until the plaintiff should pay the taxed costs in two previous actions commenced by the plaintiff against the defendant on the same cause of action and which had been dismissed. This motion was based on an affidavit made by one of the defendant's attorneys stating the facts. After the filing of these papers the presiding judge called upon the Honorable W. C. SILVERTHORN, the presiding judge of the Sixteenth circuit, to hear the motion, and Judge SILVERTHORN attended and heard the motion at Hayward, Sawyer county, October 28th, and continued the same for further hearing, but in the meantime ordered that the plaintiff's proceedings be stayed, so far as

moving the case for trial at the next November term of court was concerned, until such costs were paid. The costs were not paid and the case was not noticed for trial at the November term, and on May 25, 1905, Judge SILVERTHORN made an order and sent it to the clerk of court of Sawyer county vacating the temporary stay and authorizing the plaintiff to notice the cause for trial at the June term. Thereupon the case was noticed for the June term by the plaintiff. On June 5th, being the last day of the November, 1904, term, the defendant appeared in court and moved that the case be sent to another county, but the motion was denied by the presiding judge. The action was called for trial at the June term on the 26th day of that month, at which time Judge SILVERTHORN attended and presided, and the defendant renewed the motion to send the case to another county as well as the motion for a stay of proceedings until the costs of the previous actions were paid, but both motions were denied.

The appellant's contention is that, because no judge attended to try the cause during the November, 1904, term, it became the duty of the presiding judge to change the place of trial under the terms of sec. 2625, Stats. 1898, as amended by ch. 101, Laws of 1901, and ch. 282, Laws of 1905. That section provides that the court shall change the place of trial of any action or special proceeding on the application of a party thereto who shall file his affidavit alleging prejudice of the presiding judge, but that, in lieu of granting such application, the judge may in his discretion retain the action or proceeding in the same court

"until the last day of the then current term if the application is made at a term at which the action is triable, or the next term if it is made in vacation, and in the meantime shall call upon some other judge or judges to attend and hold court during such current or next term for the purpose of exercising jurisdiction in all actions and proceedings in which applications for change of the place of trial have been made for such reason. And while so in attendance said judge may make all

orders and hear all applications and motions that may be brought on for hearing during the time he shall so attend. If such other judge or judges (as may be necessary or convenient) can so attend and hold court for such purpose at either such terms, the same shall be done with the same effect as if a change of venue to another circuit and a trial of such action or proceeding had been had therein; *but if no such judge shall so attend,* an order for a change of the place of trial shall be entered in each action and proceeding wherein proper application has been made on the last day of such term, and thereupon such change shall be made."

The general purpose of this section is reasonably clear; but, unfortunately, its terms are by no means clear. The purpose was to secure to a party making an affidavit of prejudice a trial before an unprejudiced judge without the transfer of the case to another circuit, and at the same time to secure both parties against a long delay which might easily result were there no limitation on the time within which another judge might be called in. In other words, the purpose was to secure not only an unprejudiced trial, but a trial in the home circuit, provided a competent judge seasonably attends. It evidently contemplates that there shall always be one term during which the case can be tried in the home circuit, and that such term shall be a term at which the case is in situation to be moved peremptorily for trial. It clearly does not contemplate that the case shall be sent from the circuit after the lapse only of a term at which it could not be tried. In the present case the affidavit of prejudice was filed in the June term, at which term the case was not triable. At the time of filing the affidavit application was evidently made for a change of venue thereon, and at the same time application was made by the defendant for a stay of proceedings. Another judge was immediately called in and did attend and heard the motion for stay of proceedings, and granted it so far as to prevent the noticing of the case for trial at the next term. Thus the claim is that the defendant, after making its application

for change of venue, by its own act had been able to deprive the plaintiff of the privilege of having the case tried at the home circuit, a valuable privilege which the statute intended to secure to him. Such a construction of a statute should not be adopted unless the wording of the statute plainly and unambiguously demands it. The command of the statute is that the change shall be made "if no such judge shall *so attend;*" and the question is: Did Judge SILVERTHORN "so attend" when he came to Hayward and heard the motion for a stay of proceedings in October, 1904? It is argued that he did not, because he was not then called in to try the case, but only to hear a motion at a time when the case was not triable. We do not so construe the statute. The words "so attend" refer back to the previous provisions of the section, and to these provisions we must go to ascertain the meaning intended. After providing that the circuit judge may retain the action until the last day of the current term if the application is made at a term at which the action is triable, or the next term if it is made in vacation (this latter clause evidently covering an application made at a term at which the action is not triable), the statute says that the judge "*in the meantime* shall call upon some other circuit judge or judges to attend and hold court during such current term or next term *for the purpose of exercising jurisdiction* in all actions and proceedings in which applications for change of the place of trial have been made for such reason." The statute then gives such visiting judge power to hear and decide all matters brought on for hearing during his attendance, and provides that if such judge or judges "can *so attend* and hold court for such purpose at either such terms, the same shall be done with the same effect" as if an actual change of venue and trial in another circuit had been had. It will be noticed that the requirement is that the presiding judge shall in the meantime call in another judge for the purpose of *exercising jurisdiction* and not for the purpose of trying the case alone.

Here the application for change was made during the June term, and it was coupled with a motion requiring action of the court. Judge PARISH could not hear the motion because of the filing of the affidavit of prejudice, but he chose to retain the action in the county, as the statute allows. Therefore he called in Judge SILVERTHORN to hear the motion and Judge SILVERTHORN attended. By this course the command of the statute in terms was satisfied. Judge PARISH did in the meantime call upon another judge to attend and hold court for the purpose of *exercising jurisdiction,* and such other judge did attend and exercised jurisdiction, although he did not try the case. We think Judge SILVERTHORN did "so attend" within the meaning of the statute, and that there was no error in refusing to change the venue on the last day of the November term, and hence that the action was properly triable in Sawyer county at the June term, 1905.

The second contention of the appellant is that the trial court erred in not staying proceedings in the action until the costs of two former actions brought on the same cause of action had been paid. It appeared by the affidavits submitted that in January, 1903, the plaintiff commenced an action against the defendant to recover for the same injury, alleging in his complaint defective packing of the piston head as the only ground of negligence; that issue was joined and the case noticed for trial at the May term, 1903, at which time the plaintiff filed an affidavit of prejudice, and the case was sent to the circuit court for Chippewa county and came on for trial at the October term, 1903; that upon the trial the plaintiff offered to show that the port steam pipe was too small, but that this testimony was ruled out because not within the issue, whereupon the plaintiff asked and was granted leave within ten days to amend his complaint, alleging this new ground of negligence, upon payment of $46, and the cause was continued; that plaintiff failed to comply with the order and the action was thereafter dismissed, with costs taxed at $183.86; that execution on said judgment was issued and returned un-

satisfied; that plaintiff commenced another action against defendant for the same injury in February, 1904, alleging in his complaint as ground of negligence inadequate size of the port steam pipe, in which action issue was joined and the trial was commenced in June, 1904; that the engineer, Lee, was called as a witness and took on himself the entire blame for the accident, whereupon the plaintiff's attorney, being taken by surprise by his testimony, submitted to a voluntary nonsuit, and judgment was entered thereon, with costs taxed at $131.10, which have never been paid; that this action was immediately commenced and a complaint served, alleging the incompetence of Lee as an additional ground of recovery, and that defendant spent about $1,500 in procuring the attendance of witnesses and preparing for the trial of said previous actions. It further appeared by plaintiff's affidavit that he has no property save a small homestead worth not more than $300, some household furniture, a pony, cart, cow, and calf, worth not exceeding $230 in all; that he has a wife and three minor children, only one of whom is able to earn wages; that he himself is unable to earn regular wages by reason of his disability and can earn barely enough to support his family, and has been unable to pay said judgments or to borrow money from others to do so. The affidavits of the plaintiff and his attorneys tended to show that in their judgment plaintiff has a meritorious cause of action, and, further, that the various actions were prosecuted in good faith and not for the purpose of vexing or harassing the defendant. Whether the present action should have been stayed or not was a question appealing primarily to the discretion of the trial judge, and his ruling thereon will not be reversed except for abuse of such discretion.

The general rule is that, where a plaintiff has been nonsuited and brings a second action for the same cause, a presumption arises either that the second action is vexatious or that the cause of action is without merit, and hence that a court will not allow the plaintiff to proceed with the second

action until he has paid the costs of the first. *Felt v. Amidon,* 48 Wis. 66, 3 N. W. 825. This presumption, however, yields to proof showing that the prosecution of the second action is in good faith, and that the failure of the previous action was not due to infirmity in the cause of action, but to untoward circumstances or excusable mistake. When in connection with such proof it appears that the plaintiff is absolutely unable to pay the previous costs on account of poverty and want of credit, a case arises where the court in the exercise of a wise and just discretion may fairly allow the second action to proceed notwithstanding the previous costs are unpaid. Our courts are open for the prosecution of meritorious and *bona fide* causes of action in good faith. Poverty gives no license to any one to vex or harass his neighbor with unfounded lawsuits. On the other hand, poverty alone should not prevent the needy litigant who presents a meritorious cause of action from invoking the courts to do justice between him and his neighbor. The facts presented on the motion were sufficient, in our judgment, to justify the court in refusing to stay proceedings; at least we cannot say that there was any abuse of discretion in the ruling.

No notice of injury, as required by subd. 5, sec. 4222, Stats. 1898, was served by the plaintiff, and the present action was not commenced until more than a year after the happening of the accident. The failure to give the notice was pleaded as a defense, and the claim is made that the action was barred by reason of failure to give the notice. The first action to recover damages for this injury was, however, brought and the complaint served within the year. By ch. 307, Laws of 1899, sec. 4222, *supra,* was amended by adding the following provision:

"When an action shall be brought and a complaint actually served therein within one year after the happening of the event causing such damages, the notice herein provided for need not be served."

This provision is not ambiguous. It does not provide that the action in which the recovery is finally had shall be brought within the year, but only that, when an action (meaning, of course, an action to recover for the same injury) shall be brought and the complaint served within the year, no notice need be served. The condition was exactly fulfilled in the present case. The statute does not make it essential that the previous complaint shall allege the same grounds of negligence as that upon which the recovery is obtained, nor can we add any such requirement by construction. Under the terms of the statute, therefore, no notice was necessary. Passing from these preliminary questions to the trial itself, we meet numerous exceptions to rulings upon evidence, some of which may well be treated in groups.

Evidence was received against objection and exception tending to show that the steam-feed apparatus was defective in not having attached certain drainage devices called bleeders or traps to drain the water out of the steam pipes at and near the valve, the idea being that by reason of the absence of these devices water accumulated in the valve and washed away the lubricating oil, thus making the valve and lever work hard and become difficult to move and the carriage hard to control. The complaint in substance described in detail the saw carriage and the steam feed and controlling valve, as well as the method of operation of the whole apparatus, and charged that proper methods of construction required that the steam feed and valve should always be subject to the control of the operator or head sawyer; that by reason of the small size of the port pipe the apparatus could not be so controlled, but was likely to get beyond control and endanger the lives of employees working thereon; that there were other defects in construction rendering said machinery dangerous, known to the defendant but unknown to the plaintiff; that by reason of the careless and unskilful operation of the carriage by Lee, coupled with said defects in construction, Lee lost

control of the steam feed and the carriage moved with such velocity as to throw the plaintiff down and cut off his leg.

Now, the question is whether the allegation of the specific fact that the port pipe was too small precluded the plaintiff from showing that there were other defects in construction tending to render the apparatus not readily controllable, or, as the witnesses describe it, causing the lever to work hard and the carriage to jerk or stick. The general rule applicable to all actions is that the complaint must inform the defendant of the facts from which it is claimed his liability results, in order that he may prepare to make his defense advisedly. A plaintiff should not be allowed to charge negligence in one respect and upon the trial prove negligence in an entirely different respect. The rule does not, however, require the pleading of mere evidence, but only of the ultimate fact, nor does it require impossibilities. An operative upon or about a machine may know that it did not operate properly and that essential parts were not subject to control, but he may not know, nor be able to find out by reason of lack of expert knowledge, the precise cause of the irregular action, and experts themselves may differ on the question. In such cases the question is whether he must at his peril ascertain the initial cause of the defective operation and set it forth, or whether it is sufficient if he describe the machine and its operation and allege the ultimate fact that the machine was defective in that it was not at the time subject to control by the lever as it should have been, and that thereby it became uncontrollable, and that the accident resulted from such want of control. We think the latter course is sufficient, at least as against demurrer or objection upon the trial, although it may be that the pleading would be subject to motion to make it more definite and certain. It is true that in the present case the plaintiff alleged one specific fact which he claimed was a cause of the uncontrollability, but he also alleged that there were other defects unknown to him; and after all the signifi-

cant and substantial ground of his claim of negligence was plainly stated to be that the steam feed and carriage were defective because not subject to immediate and effective control by the sawyer, and we think that this was sufficient to entitle him to introduce evidence of defective construction in any respect which is shown to be effective to produce the uncontrollable condition. We find no error, therefore, in these rulings.

Two witnesses who worked on the same carriage at the time of the trial of the case in June, 1905, were allowed, against objection, to testify that the carriage "worked nice and smooth now." There was evidence in the record that there was no change in the condition of the machine from April, 1902, until the following season, but there was evidence that there had been a material change between March, 1903, and the time of the trial. The evident effect of the evidence that the carriage ran "nice and smooth now" would be that it could be claimed therefrom that the changes made had been in the way of repairs to the supposed defects after the accident. Such evidence is not admissible. *Lang v. Sanger,* 76 Wis. 71, 44 N. W. 1095. An expert witness was allowed to testify that the apparatus did not work perfectly in March, 1903, but bothered at times. This testimony was admissible, because the evidence showed that there had been no changes between the time of the accident and the time when the witness examined its operation.

A hypothetical question, asked by the court of this same witness, which assumed that there was some trouble with the steam feed, which caused the carriage to jerk and start and stop suddenly, and which asked whether it was practicable to remedy the trouble, was objected to as assuming facts not supported by the evidence. This objection is not tenable, because there was some evidence that the carriage would stop and start abruptly with a jerk. The witness Wallace, an expert, was allowed to answer a very long hypothetical question

against objection, and the ruling is assigned as error, but, as counsel has not seen fit to specify in what respect the question failed to correspond to facts in evidence, we do not deem ourselves called upon to search them out. One of the plaintiff's expert witnesses testified on cross-examination that the opening from the valve chamber into the port pipe did not wholly control the amount of steam going into the pipe, and was then asked why not. An objection to the question was sustained, but it is very clear that the question was entirely proper.

There were a number of rulings excluding expert evidence offered by the defendant which were clearly erroneous, and while in a number of these instances the evidence seems in fact to have got in after the ruling, we will briefly name the instances as a guide upon a new trial. In this class is the ruling excluding evidence that it was a physical impossibility for the difference in the size of the port pipe and the supply pipe to affect the working of the valve; that the difference would have no effect on the accumulation of water; that the Dittbenner valve (being the valve in use in this apparatus) is in general use in Wisconsin and in this section of country; and that it is manufactured and supplied by reputable makers of sawmill machinery. In this class also are the rulings excluding questions as to the effect of the running of the carriage against the bumper on the movement of the plug in the valve; the effect of water in the valve on the movement of the sawyer's lever; whether it is possible for the valve to reverse without movement of the lever; whether a certain six-inch pipe was in accordance with the usual construction; and whether it was physically possible for the carriage to run back after striking the bumper without movement of the sawyer's lever.

The defendant placed the plaintiff on the stand as an adverse witness, and sought to show by him that the action was prosecuted under a champertous agreement with his attorneys. The plaintiff produced the written agreement, which

contains nothing of a champertous nature, and testified that he had no other arrangement of any kind with his attorneys. Numerous questions were asked him as to some additional understanding with his attorneys, but he again denied that he had any other agreement except the written one, and finally the court sustained an objection to further examination upon the subject. There was no apparent prospect of any result from the examination. It seemed much like a mere fishing excursion, and we think that after the witness had twice denied that there was any agreement except the written agreement, and had produced it, the court was amply justified in stopping the examination.

The defendant moved for a directed verdict in its favor on the ground that no negligence was shown, and that, if negligence was shown, it was not the proximate cause of the injury. This motion was denied, and the defendant vigorously assails the ruling. Examination of the evidence satisfies us that the motion was properly denied. There was evidence on the part of three employees in the mill, who either worked on or about the carriage, that for months before the plaintiff's injury the carriage jerked. Dahl, a carriage rider, testified that at times the lever worked hard, and that at these times the carriage would jerk, nearly throwing him off; that the head sawyer complained of this to the superintendent; that the carriage was sticking and jerking on the morning of the injury, and that the head sawyer had to take hold of the lever three times to get the carriage back to the log deck; that the lever frequently worked so hard that the sawyer had to grip it with both hands. Fykrud, another co-employee, who was working as a setter on the other saw carriage on the day of the accident, but frequently had been a rider on the carriage in question, testified to the same condition of things in substance; that the carriage jerked when the sawyer stopped it; that it would stop abruptly and start abruptly with a little jerk, and he could not stop it at the place where he wanted

to. Johnson, another co-employee and a carriage-rider, testified to much the same effect as to the jerking of the carriage and as to the complaints to the engineer and superintendent, and that when the feed worked hard it would give the men on the carriage a jolt and would make it harder for the engineer to move his lever. The head sawyer, Magnuson, was not present, and his testimony was not taken. Here certainly was considerable evidence tending to show that the lever and valve frequently worked hard, so as to require much effort on the part of the sawyer to reverse the motion of the carriage, and that the mill superintendent had been notified of the fact. It is not disputed that the carriage ran against the bumper when Lee, the engineer, was testing it under full head of steam, and that the crash threw the plaintiff down with his leg in front of the saw. This crash must have resulted either because the lever was not reversed at all or because it was not reversed soon enough. Now, while the engineer, Lee, testified in substance that the carriage ran smoothly, and that it struck the bumper because he was rattled and did not reverse quick enough, he further testified that he did not pretend to remember just how it happened, and we think it was fairly within the province of the jury to decide whether the alleged difficulty in operating the valve was not in part the cause of Lee's failure to seasonably reverse the lever.

It is said further that there was no sufficient evidence of the incompetence of Lee, the engineer, or, if there was, that there was nothing to show that such incompetence had any causal connection with the accident. Lee, however, testified that he had no education as an engineer; that he had acted as engineer at this mill five seasons before the accident, having previously been a millwright; that when he went to work as an engineer he did not claim to have had any experience; that he was not then a competent engineer, and so told the superintendent of the company when he took the position, and the understanding was that they took all the responsibility; that he studied engineering books and papers while employed, and

did not know whether he would now call himself a competent engineer; that his duty as engineer required him to look after the machinery, including the steam feed, and see that it was working properly; that complaint was made to him on the morning in question that the steam feed was not working right, and he went to investigate, and took hold of the lever and ran the carriage back and forth a few times and felt nothing wrong, when the sawyer told him to open the valve full and he did so, and it got away from him and the carriage struck the bumper; that after he did reverse he was too excited to stop it before it got to the saw and he lost control of it; that he never before ran any carriage operated by steam feed by the use of the lever at full speed or with a full head of steam.

We think there was sufficient evidence here to take the question of Lee's alleged incompetence to the jury, as well as the accompanying questions whether such incompetence was known, or should have been known, to the defendant, and whether the accident was either wholly or partially the result of such incompetence. In this connection it is proper to observe that the eighth question of the verdict is not well framed and should be amended upon a new trial. It asks whether the injury was caused by the incompetence or *want of skill* of Lee. The sole inquiry in this respect is whether it was proximately caused by the *incompetence* of Lee, and the question should be framed to put this question only. If the words "want of skill" mean incompetence in the question as framed, then they are surplusage. If they mean something different, then they are not only immaterial but make the question double.

The defendant requested the submission of a number of more specific questions as a part of the special verdict, but we think that, while the verdict as submitted was not ideal, still with the exception above noted and another now to be stated it fairly covered the issues.

Under the ruling of this court in *Lowe v. Ring,* 123 Wis.

370, 101 N. W. 698, it seems to be a very serious question whether questions 7 and 10 of the special verdict are not defective for duplicity. They ask whether the company knew or ought to have known. These are separate facts. Part of the jury may think the company knew and part that it ought to have known, but the entire jury may not agree on either fact. This question is not raised on the appeal and we do not decide it, but upon another trial separate questions should be asked covering these propositions.

It may be noted in passing that the twelfth question is not quite accurate, but the inaccuracy is favorable to the defendant. It is not necessary that the majority of millowners under the same circumstances should have reasonably foreseen that Lee's incompetence would be likely to cause an injury to the plaintiff, but only that it would be likely to cause an injury to another. *Meyer v. Milwaukee E. R. & L. Co.* 116 Wis. 336, 93 N. W. 6.

After the close of the evidence and before the argument of the cause to the jury, the defendant requested the giving of fifteen instructions, all of which were refused, and error is alleged upon the refusal to give several of them. It is attempted to justify the refusal of all the instructions upon the ground that they were not submitted in time within the provisions of Rule VIII of the Rules of the Circuit Court for Sawyer county. This rule reads as follows:

"Should a party to a jury trial desire the court to instruct the jury on a proposition of law he must submit his request in writing before he shall first rest his case, and he shall cite the authorities upon which he relies to support each proposition or the court will not consider such request."

If this rule be valid it seems to be a complete justification of the ruling of the court, but in order to be valid it must of course be reasonable. The right to present instructions applicable to the case and have them given to the jury if they

state the law correctly is an ancient right, recognized and guaranteed by our statutes (sec. 2853, Stats. 1898), subject to the limitation that they must be in writing. *Hacker v. Heiney,* 111 Wis. 313, 87 N. W. 249. No rule is reasonable which substantially impairs these rights. That this rule does this cannot be doubted. Under it a plaintiff must present his proposed instructions before the evidence for the defense is introduced and at a time when he cannot know what form that evidence will take, and a defendant must submit his instructions before plaintiff's evidence in rebuttal is heard. To know what instructions would be proper or applicable in advance of the giving of the testimony to which it is to apply, the counsel must be a prophet as well as a lawyer. There may be such lawyers, but they form the exception rather than the rule in this jurisdiction. Nor can it be held that a request to give a correct instruction can be denied without error simply because an authority is not cited to enforce it. In both respects we regard the rule as entirely unreasonable and hence void.

Among the instructions so requested are the following, which stated correct legal principles applicable to the case and were not covered by the general charge:

"(7) You are instructed that you cannot find that Reodor Lee was incompetent unless you find that he was so deficient in the qualifications necessary to perform his work as an engineer as would make it an act of negligence on the part of any one to employ him in such capacity who had knowledge of such disqualifications. . . . (9) You are instructed that, if the plaintiff failed to exercise any want of ordinary care, however slight, which contributed to his injury, then you must answer question number 5 'Yes.' (10) You are instructed that the burden of proof as to questions numbered 3, 4, 7, 8, 10, 11, 12, 14, and 15 is upon the plaintiff to satisfy your minds by a fair preponderance of the evidence to a reasonable certainty that said questions should be answered in the affirmative, and unless you are so satisfied you should answer said questions 'No.'"

The error in refusing the tenth requested instruction is emphasized by the fact that the court in its general charge on the subject of the burden of proof gave only the positively erroneous charge that each question "must be answered according to the preponderance of the whole evidence and all the circumstances of the case." *Anderson v. Chicago B. Co.* 127 Wis. 273, 106 N. W. 1077.

Another instruction was asked upon the subject to the effect that disputed questions of fact could not be determined upon mere conjecture, but that there must be some direct evidence of the fact or evidence tending to establish circumstances from which the jury could reasonably say that the inferences therefrom *clearly* preponderate in favor of the existence of the fact. This instruction is inaccurate, in that it requires a *clear* preponderance of the evidence in order to justify a finding. This is not the rule in civil actions, except in cases of alleged fraud or actions brought to set aside solemnly executed written instruments.

Another requested instruction was to the effect that the jury could not find the engineer, Lee, incompetent from the fact that he may have been guilty of one *or more* isolated acts of negligence. This was too broad a statement. Proof of a single act of negligence is not sufficient to raise an inference of incompetence (*Kliefoth v. N. W. I. Co.* 98 Wis. 495, 74 N. W. 356), but proof of many such acts may, and the instruction might easily be construed as meaning that incompetence could not be inferred from proof of many acts of negligence.

The following instruction was asked, and seems to contain a substantially correct statement of the law (*Maitland v. Gilbert P. Co.* 97 Wis. 476, 72 N. W. 1124):

"(8) You are instructed that the duty of the defendant was to use ordinary care and diligence in respect to employing competent servants, having regard always to the character of the particular service and the consequences that might result

from incompetency in such service. If the defendant exercised such care and diligence in retaining in its employ Reodor Lee at the time of the accident, the defendant was not guilty of negligence in so doing, notwithstanding the fact that Reodor Lee may have been incompetent at such time, and notwithstanding the fact that an injury to the plaintiff may have resulted by reason of such incompetency."

However, as the instruction was general and does not apply to any question of the verdict, the refusal to give it was not error.

An instruction to the effect that, if Lee reversed the lever and caused the carriage to run towards the saw just prior to the accident, the jury could not find that negligence in the construction of the steam feed was the proximate cause of the injury, was properly rejected, for the reason that, as before indicated in this opinion, we think the evidence was sufficient to take to the jury the question whether the alleged sticking of the valve was not instrumental in producing Lee's failure to reverse the lever in proper time. Upon the question of proximate cause the court instructed the jury that it was "the immediate, direct, actual, natural, efficient, and real cause." This was inaccurate but not prejudicial, because it placed a heavier burden on the plaintiff than the correct rule, which has so often been laid down by this court that we do not repeat it here. Moreover, the elements of fact constituting proximate cause having been found in answer to specific questions, an inaccuracy in the definition is not harmful. Upon another trial, however, if a definition be given it should be the correct one.

A claim is made that the verdict is excessive, but we are unable to so regard it.

We find no other contentions that require discussion.

By the Court.—Judgment reversed, and action remanded for a new trial.

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1. The part payment of an admitted debt is no consideration for an agreement not to enforce the collection of the balance of the debt. *Weidner v. Standard L. and Acc. Ins. Co.* 10
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1. In an action for personal injuries to a traveler on a highway in consequence of his horse becoming unmanageable by being frightened by a dog, under the evidence, stated in the opinion, it was *held* that a verdict for defendant could not be disturbed. *Nolan v. Kroening,* 79
2. In such case instructions to the jury, stated in the opinion, are *held* to be free from error. *Ibid.*
3. In an action for personal injuries inflicted on plaintiff by defendant's bull after its escape from defendant's premises onto the adjoining premises of plaintiff, a verdict of $800 for plaintiff is *held* supported by the evidence, and is neither perverse nor excessive in amount. *Hadtke v. Grzyll,* 275
4. In such case evidence that the bull had broken through the fence into plaintiff's premises on three previous occasions during the same summer is admissible as tending to show that the defendant "suffered" the bull to be at large. *Ibid.*
5. Sec. 1482, Stats. 1898, as amended by ch. 14, Laws of 1903, does not impose an absolute liability upon the owner of the animal. *Ibid.*
6. Sec. 1482, Stats. 1898, as amended by ch. 14, Laws of 1903, differentiates between "the running at large" and "the escape." It is the escape alone which is inexcusable by showing diligence, not the running at large. *Ibid.*
7. Sec. 1482, Stats. 1898, as amended by ch. 14, Laws of 1903, does not impose liabilities upon the owner of the animal which are so unreasonable and extreme as to be beyond the limits of police power. *Ibid.*

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APPEAL AND ERROR.

Decisions reviewable: Appealable orders. See DISCOVERY, 3.

1. An order of reference involves the merits of the action and is reviewable on an appeal from the judgment under sec. 3070, Stats. 1898, but does not prevent a judgment from which an appeal may be taken, and hence is not reviewable under subd. 1, sec. 3069. *Wilt v. Neenah Cold Storage Co.* 398
2. An order striking out a demurrer as irregular is not appealable. *Steinberg v. Saltzman,* 419

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3. The right of appeal is statutory, and, where not given, an appeal in form does not confer jurisdiction. *Wilt v. Neenah Cold Storage Co.* 398

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4. In the absence of any exceptions to the charge of the court no question relating to instructions can be considered on appeal. *Haas v. Powers,* 406

Same: Bill of exceptions: Certificate.

5. A bill of exceptions recited, at the close of the evidence, that it contained "all the evidence material to the questions raised on the appeal," and in the certificate it was declared to contain "all the testimony given on both sides necessary to present the questions raised upon the appeal." *Held,* that the recitation at the close of the evidence, and necessarily certified to be true by the judge's signature, satisfied all requirements. *Cape v. Plymouth Congregational Church,* 174

6. In the rule that, to enable this court on appeal to go behind either the findings or the verdict, there must be a certificate of the trial judge that the bill of exceptions contains all the evidence, the expression "all the evidence" means all *necessary* evidence. *Ibid.*

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Briefs: Failure to serve: Penalty.

7. Where a party fails to serve his brief within the time prescribed he is properly chargeable with the penalty denounced by Supreme Court Rule 46. *Sackett v. Price County,* 637

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8. Where, on a careful examination of the evidence, it cannot be said that the findings of the trial court are antagonized by a clear preponderance of the evidence, they will not be set aside. *Jost v. Wolf,* 37

9. If there is any credible evidence to support a verdict it cannot be disturbed on appeal. *Nolan v. Kroening,* 79

10. In determining whether there is such credible evidence or not the record should be viewed in the most favorable light it will reasonably bear in support of the verdict, and the conclusion of the trial judge thereon will not be disturbed unless clearly wrong. *Ibid.*

11. In such case it is not sufficient that there is room for the trial judge to have reached, or that the supreme court might have reached, a different conclusion. *Ibid.*

12. Findings made on a motion for a new trial, that jurors were not guilty of misconduct, must stand unless they appear to be against the clear preponderance of the evidence. *Ibid.*

13. Where the evidence adduced on an issue is conflicting, and there is no clear preponderance to support appellant's claim, the findings thereon will be affirmed. *Luetzke v. Roberts,* 97

14. In determining on appeal whether the trial court erred in holding that any particular issuable fact or facts were established

without room for reasonable minds to reasonably differ in respect thereto the decision below should not be disturbed unless it clearly appears to be wrong. *Hodge v. Smith*, 326

15. Conclusions of law, or such in effect, found in the trial court's decision as conclusions of fact, and conclusions of fact reached by wrong application of legal principles, do not fall within the rule that the findings of the trial court should not be disturbed unless against the preponderance of the evidence. *Figge v. Bergenthal*, 594

16. Such rule has no application when the trial court has found the facts of the case and followed such findings with conclusions that the transactions involved were fraudulent, harmful, and void, and the appellate court reverses such conclusions. *Ibid.*

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17. Error assigned respecting the reception and rejection of evidence, not claimed to relate to findings of the jury questioned, not considered. *Nolan v. Kroening*, 79

18. Where a defense is conclusive in favor of the judgment sought to be reviewed, whether or not errors were committed in ruling upon other issues in the cause, and assignment of such errors, need not be considered. *Steffen v. Supreme Assembly of Defenders*, 485

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19. In a criminal prosecution tried by the court without a jury the admission of improper evidence is to be regarded on appeal as having been harmless, unless it clearly appears that otherwise the finding would probably have been different. *Topolewski v. State*, 244

20. It is error to direct a verdict upon conflicting testimony. *Custard v. Wigderson*, 412

[21. Whether, on sustaining a demurrer to a complaint and granting leave to answer on terms, omission of notice to the plaintiff of application for judgment on failure to plead within the time allowed is of itself a fatal error, or merely such an irregularity in procedure that reversal need not result unless, in some form of application to the trial court, appellant (plaintiff below) shall have made affirmatively to appear that he has suffered substantial prejudice thereby, not determined, the appellate court being equally divided in opinion thereon.] *Stark v. Huber Mfg. Co.* 432

22. It is competent for the trial judge in a mere colloquy with counsel, instigated by the latter, to test the contention of counsel by inquiry or counter suggestion, and expression of an erroneous opinion by the trial judge to counsel during such discussion, although in the presence of the jury, except in rare cases of obvious prejudice, is not ground of reversal when the con-

clusion finally reached and carried into effect, either by ruling on evidence or instruction to the jury, is correct. *McGowan v. Watertown,* 555

Conclusiveness of former decision: Law of the case. See APPEAL, 24–26.

23. When on appeal from an order sustaining a demurrer a decision has been made by the supreme court it becomes the law of the case, and must control any situation not materially variant from that set forth by the complaint and then considered. *Cape v. Plymouth Congregational Church,* 174

Determination of cause: Reversal: New trial or direction of verdict: Practice.

24. Although proper motions have been made to strike out and change the answers to a special verdict, where there are legal principles involved which were not appreciated by the parties or the trial court, and it is not improbable that on another trial there may be testimony on lines not covered on the first trial, a new trial is directed. *Dunham v. Salmon,* 164

25. Findings of the trial court merely affirming the issues joined by a general denial of the allegations of the complaint, without declaring specifically upon the affirmative defenses presented by the answer, except that all the material allegations of the answer are unproven and untrue, do not conclude the appellate court in the presence of evidence so in conflict as to present but a mere preponderance either way. *Closuit v. John Arpin L. Co.* 258

26. In such case the appellate court will choose between three courses of action: Affirm the judgment if clearly supported by a preponderance of the evidence; reverse if not so supported, ordering judgment in accordance with what appears to be the preponderance of the evidence; or, if that course seems to present peril of injustice, remand for further trial and findings. *Ibid.*

Same: Mandate on reversal. See LIMITATION OF ACTIONS, 3.

Same: Rehearing. See COMPROMISE AND SETTLEMENT, 3.

Same: Equally divided court. See MANDAMUS.

Appeal from county court: Bonds: Liability of sureties. See WILLS, 3.

27. The surety on an undertaking given under sec. 4032, Stats. 1898, is not liable for the costs awarded on an appeal from the circuit to the supreme court. *Breed v. Weed,* 264

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ARTIFICIAL MONUMENTS. See BOUNDARIES, 6.

ASSAULT.

See FALSE IMPRISONMENT. INSURANCE, 16. ROBBERY.

1. An empty revolver merely pointed at a person, and not used to strike with, is not a dangerous weapon, however much the person at whom it is pointed may be put in fear. *Lipscomb v. State,* 238

2. A loaded revolver pointed at a person within shooting distance is a dangerous weapon as a matter of law. *Ibid.*

3. In a criminal prosecution when the state proves that a gun or revolver was pointed at a person within shooting distance with a threat or other words indicating intention to fire, the person assailed not knowing but that it is loaded, the state has made *prima facie* proof that the gun or revolver was loaded and consequently a dangerous weapon. *Ibid.*

4. Such facts, if proven beyond a reasonable doubt, conclusively establish an assault, are *prima facie* proof that the assault was committed with a dangerous weapon, and it then devolves upon the defendant to show that the weapon was not loaded in order to meet the presumption that it was loaded. *Ibid.*

ASSAULT AND BATTERY.

1. In an action for assault and battery it appeared, among other things, that plaintiff entered the shop of defendants, and publicly and peaceably obtained possession of a union card under claim of right, and while leaving the shop was attacked by defendants, assaulted, and beaten severely in efforts to regain possession of the card by force. There was no evidence that plaintiff was resisted in any way in his obtaining peaceable possession of the card. *Held*, that the assault and battery were unjustifiable. *Farley v. Briebach*, 231

2. In such case whether defendants had forfeited their right to the card or not did not alter the situation. It was sufficient that the union claimed the right to remove it, and that plaintiff went into the shop to get possession of the card, and did get possession of it peaceably. *Ibid.*

ASSESSMENTS. See HIGHWAYS, 7–10. MUNICIPAL CORPORATIONS, 1–8.

ASSUMPTION OF RISK. See MASTER AND SERVANT, 11. RAILROADS, 9.

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AVOIDANCE. See SALES, 5.

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BANKRUPTCY.

Fraudulent conveyances.

1. It is sufficient to authorize the trustee of a bankrupt to maintain an action to set aside a conveyance that the transfer was fraudulent as against creditors existing at the time it was made. *Treseder v. Burgor*, 201

2. In such case, whether or not subsequent creditors can participate in the assets recovered by the trustee is immaterial so far as the trustee's right to maintain the action is concerned. *Ibid.*

3. In such case the adjudication of the question how the fruits of the litigation shall be distributed among creditors is for the federal court in which the bankruptcy proceedings are pending. *Ibid.*

4. In an action by a trustee in bankruptcy to set aside a conveyance because fraudulent as to creditors, a complaint showing a cause

of action to set aside the conveyance upon the ground that it was, at least, fraudulent as to some creditors, is *held* sufficient. *Ibid.*

5. In an action by a trustee in bankruptcy to set aside a deed as fraudulent as to creditors, the evidence, stated in the opinion, is *held* to sustain findings that the deed was valid only as an equitable mortgage to secure the bankrupt's actual indebtedness to the grantee, and that such indebtedness was only $380. *Ibid.*

Discharge.

6. When a discharge in bankruptcy is in due form, whether the proceedings in the bankruptcy court upon which the discharge is based are regular or not cannot be questioned collaterally. *Custard v. Wigderson,* 412

7. In an action on a note given to plaintiff "A. Custard" before the defendant was discharged under the federal bankruptcy act, it appeared, among other things, that a claim was scheduled in the bankruptcy proceedings under the name of "A. Castard." *Held,* under sec. 17, ch. 541, 30 U. S. Stats. at Large, that the debt to "A. Custard," the plaintiff, was not discharged. *Ibid.*

BANKS. See PAYMENT, 2.

BENEFIT SOCIETIES. See INSURANCE, 8–15.

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BILLS AND NOTES.

Requisites and validity: Execution and delivery. See CORPORATIONS, 11–14. FRAUD, 1, 3–6.

1. If a person secures signatures to a note under promise that the paper shall not be regarded delivered as a binding obligation till others, specified by name or as to numbers, shall have signed and then secures the unconditional signatures of part only of such others, keeping silent as to the conditional character of the former signatures, the latter are to be regarded as having been obtained by fraud. *Hodge v. Smith,* 326

2. If a promissory note, in form, is delivered by the maker to the payee, the act being accompanied by a verbal agreement that the instrument shall not take effect till some specified condition shall have been performed, as that other persons specified by name or number shall have signed, the paper, as between the original parties, will have no validity till the condition shall have been satisfied. *Ibid.*

3. In the circumstances last stated, proof of the contemporaneous verbal agreement does not violate the rule that a written instrument cannot be varied by proof of a verbal promise, since such proof only goes to the question of whether the paper ever had vitality as a contract. *Ibid.*

4. In the circumstances above stated, if the condition is that certain other signatures shall be obtained, only part of which are thereafter secured, they signing unconditionally and without being informed of their co-makers having signed conditionally and they are prejudiced thereby, in that the paper does not take effect as to such conditional makers, they may defend on

the ground of fraud, while such co-makers may defend on the ground of the paper never having been delivered, so long as the same remains in the hands of the original holder or any subsequent holder not having obtained the same in due course. *Ibid.*

Same: Consideration. See PATENTS, 1, 2, 5.

Transfer: Holder in due course: Defective title.

5. A holder of commercial paper in due course is one who takes the same when (a) it is complete and regular upon its face; (b) he became the holder of the paper before it was overdue and without notice that it had been previously dishonored, if such was the fact; (c) he took it in good faith and for value; (d) at the time it was negotiated to him he had no notice of any infirmity in the instrument or defect in the title of the person negotiating it; and (e) he took it in the usual course of business. *Hodge v. Smith,* 326
6. The transferee of commercial paper is not the holder thereof in due course, unless he has paid the full amount agreed to be paid therefor without notice of any infirmity in the instrument or in the title of the transferrer,—except to the amount thereof so paid. *Ibid.*
7. The title of a person who negotiates commercial paper is defective when he shall have obtained the instrument or any signature thereto by fraud or negotiated it in breach of faith or fraudulently. *Ibid.*
8. The holder of commercial paper is *prima facie* presumed to be a holder in due course, but in case of its appearing that the title of any person who negotiated the paper was defective then the holder in order to recover must show that he or some person under whom he claims acquired the title as a holder in due course. *Ibid.*
9. In the circumstances last stated, proof that a full consideration was paid for the paper *prima facie* establishes that it was taken in due course. *Ibid.*
10. Proof that when the paper was taken the consideration was placed to the credit of the seller on the books of the purchaser subject to the former's order, does not constitute payment. *Ibid.*
11. Ordinarily in the circumstances stated in the last paragraph the burden of proof is on the defendant to show that the debt represented by the credit was not paid, but in the circumstances stated in number 8 the burden is on the purchaser. *Ibid.*

BONDS. See APPEAL, 27.

BOUNDARIES.

1. In the location of boundaries courses and distances must give way to ancient monuments. *Thompson v. Fuhrmann,* 375
2. Where there was conflict of evidence as to a section line, the location of which depended on the correct relocation of a section corner, the verdict of a jury on such disputed question of fact is *held* supported by the testimony of plaintiff's surveyors that they established the corner with reference to a bearing tree, an ancient monument, and absence of any evidence that they violated any rule of law in establishing the corner. *Ibid.*
3. In an action for trespass in cutting and carrying away ice claimed to be the property of plaintiff, one issue was the loca-

tion of the section line bounding the tract from which the ice was cut. The location of this line depended upon the correct relocation of an original government section corner. Each party gave testimony of a survey, each showing a different location. Instructions to the jury, stated in the opinion, are *held*, as a whole, sufficiently favorable to the appellant. *Ibid.*

4. In an action of ejectment involving lots in the plat of an addition to a city no field-notes of the survey of the addition were produced. On the evidence, stated in the opinion, it was *held* that an irregular line at the crest of a descent indicated on the plat was the south boundary line of the lots in question, and not a line drawn between the east and west lines at points distant from the north boundary the number of feet called for by the figures marked upon the plat. *Miller v. Lavelle*, 500

5. Where there is a natural monument or what is equivalent to a natural monument there cannot be said to be absolutely no direct evidence as to the place of physical location on the ground of the line or point in question. *Ibid.*

6. While under the rule: In ascertaining the true location of streets, lots, and blocks according to a plat, regard is to be had (1) to the natural monuments referred to therein, and (2) to the artificial monuments placed by the surveyor to mark lines or boundaries, before resorting to the courses and distances marked in the plat or survey,—courses and distances come third in order of certainty, it is not intended to lay down a rule of law that courses and distances shall, in all cases, overcome every other species of evidence with reference to location except natural or artificial monuments. *Ibid.*

BRIEFS. See APPEAL, 7.

BULLS. See ANIMALS, 3, 4.

BURDEN OF PROOF. See ASSAULT, 3, 4. BILLS AND NOTES, 11. INSURANCE, 12. LIMITATION OF ACTIONS, 10. TRIAL, 14, 16–20.

CANCELLATION OF INSTRUMENTS. See EQUITY, 3. FRAUD.

CAPITAL STOCK. See CORPORATIONS, 1.

CERTIFICATES. See APPEAL, 5, 6.

CERTIFICATES OF STOCK. See CORPORATIONS, 1.

CERTIFIED COPIES. See INSURANCE, 13.

CERTIORARI.

Issuance of writ: Parties. See HIGHWAYS, 2, 5, 6. INTOXICATING LIQUORS, 2. OFFICERS, 2.

1. Only a party to the proceeding sought to be reviewed, or one directly affected by it, can prosecute a writ of *certiorari*. *State ex rel. Sullivan v. Drake*, 152

2. Where one not a party seeks to use the writ of *certiorari*, he must show that the decision sought to be reviewed is directed against him or his property in the sense that the enforcement of the decision would involve special, immediate, and in effect a direct injury to his interests. *Ibid.*

3. A petition for a writ of *certiorari* by the widow of a party against whom a justice of the peace rendered judgment, with no allegation that her husband left any property, or that the relator was interested in any property which could or would be in any

way affected by the judgment, is barren of any facts to show that the relator is in any way interested in setting aside the judgment. *Ibid.*

4. In such case a motion to quash the writ of *certiorari* should have been granted. *Ibid.*
5. The writ of *certiorari* is not a writ of right, but is issued only in the discretion of the court as an extraordinary process when other and ordinary remedies are inadequate. *State ex rel. Skogstad v. Anderson,* 227
6. A writ of *certiorari* cannot issue save on the relation of a party to the record sought to be reviewed, either in name or in substance, in the sense that the decision sought to be reviewed would involve special, immediate, and direct injury to his interests. *Ibid.*

Quashing the writ. See CERTIORARI, 4. HIGHWAYS, 6 (6).

CHAMPERTY. See TRIAL, 6.

CHANGE OF VENUE. See VENUE.

CHURCHES. See RELIGIOUS SOCIETIES.

CLASS LEGISLATION. See CONSTITUTIONAL LAW.

CLOUD ON TITLE. See EQUITY, 1. QUIETING TITLE. TAX TITLES, 2.

COLLATERAL ATTACK. See BANKRUPTCY, 6. EXECUTORS AND ADMINISTRATORS, 1.

COLLATERAL SECURITY. See CORPORATIONS, 14.

COMMERCIAL PAPER. See BILLS AND NOTES. CORPORATIONS, 11-14

COMMON COUNCIL. See INTOXICATING LIQUORS.

COMPENSATORY DAMAGES. See FRAUD, 5. MALICIOUS PROSECUTION, 3.

COMPLAINT. See DAMAGES, 2. DEDICATION, 2. EJECTMENT, 2, 3. EXECUTORS AND ADMINISTRATORS, 9-11, 13. INJUNCTION, 2. INTOXICATING LIQUORS, 5, 6. LIMITATION OF ACTIONS, 5. PARTNERSHIP, 1.

COMPROMISE AND SETTLEMENT.

Defenses. See ACCORD AND SATISFACTION. CORPORATIONS, 4-6. EXECUTORS AND ADMINISTRATORS, 2, 5, 6.

Same: Failure to plead.

1. Although where a defense of compromise and settlement is not pleaded, and objection is made on that ground, evidence thereof is not admissible, yet where the evidence on both sides is received without objection as to its admissibility, and that question has been fully tried out, on appeal such question must be considered as having been litigated by consent. *Petersen v. Elholm,* 1
2. In an action against a corporate officer for fraudulent conversion of corporate funds, seeking an accounting and judgment for the amount found to have been converted, the evidence, stated in the opinion, is *held* to sustain a conclusion that enumerated transactions were intended to be a full settlement of defendant's liabilities. *Ibid.*
3. On motion for rehearing, a statement in the original opinion that, while no defense of settlement was pleaded, the evidence of settlement was received without objection on that ground, and hence the question must be considered as having been litigated by consent, is *held* supported by the record. *Ibid.*

Impeachment.

4. An agreement of settlement expressed in a written release is a complete defense unless impeached for fraud or mistake. *Steffen v. Supreme Assembly of Defenders,* 485

5. To accomplish impeachment of such a formal written instrument on the ground of fraud or mistake the proof must be clear and convincing beyond reasonable controversy. *Ibid.*

6. A writing, and testimony offered by defendant, showing that plaintiff deliberately and with full knowledge entered into an agreement to settle plaintiff's claims, is not enough to warrant the direction of a verdict in defendant's favor if plaintiff's evidence, standing alone and undisputed, can, within reason, be deemed sufficient to prove with the requisite clearness and conclusiveness that the signature to the writing was induced by fraud or mistake. *Ibid.*

7. Plaintiff's testimony (stated in the opinion), upon which alone her case in respect to an alleged compromise and settlement of a claim under a benefit certificate rested, is *held,* though given the fullest credit, not to justify a finding by the jury that plaintiff's signature to a writing was induced either by fraud or mistake in the legal sense: (1) not by fraud, for there was no misrepresentation to her as to the terms of the writing; (2) not by mistake, for the law does not allow a plea of mistake as to the contents of a written instrument which the signer has full opportunity to read but neglects to, unless deterred by some act or representation of the other party. *Ibid.*

8. In such case the evidence is *held,* at most, to indicate that prior negotiations and conversations proceeded upon the basis of a gift instead of a settlement, but that all such negotiations became merged in the written expression of the agreement finally executed, which became the conclusive and exclusive proof of the contract upon which the minds of the parties met and to which they were bound. *Ibid.*

CONCURRENT ACTS. See NEGLIGENCE.

CONDITION.
Precedent. See BILLS AND NOTES, 1–4. INSURANCE, 8–10. LIMITATION OF ACTIONS, 1–6.
Subsequent. See EQUITY, 1, 2, 4. INSURANCE, 3.

CONSENT. See COMPROMISE AND SETTLEMENT, 1, 3. LARCENY.

CONSIDERATION. See ACCORD AND SATISFACTION. BILLS AND NOTES, 9–11. EVIDENCE, 6–8. FRAUDULENT CONVEYANCES. GUARANTY, 2. PATENTS, 1–3, 5. SALES, 2. SETOFF, 2. VENDOR AND PURCHASER, 2.

CONSTITUTIONAL LAW.

Police power: Class legislation. See ANIMALS, 7. INJUNCTION.

1. In determining the constitutionality of class legislation based on population, it must be borne in mind (1) that there are distinctions between large and dense communities and small and sparser ones as separate classes, and such differences are general and relevant to some purposes of legislation; (2) that merely the distinctions between individuals of one class and of the other are not to be considered; (3) that the line of demarcation may be arbitrary. *State v. Evans,* 381

2. By the enactment of ch. 56*a*, Stats. 1898, regulating the practice of pharmacy and drawing a line between communities over and under 500 population for application of the prohibition against independent practice by assistant pharmacists, the legislature did not transgress its legitimate field of discretion over public policy, and the statute is constitutional. *Ibid.*

3. Ch. 56*a*, Stats. 1898, while originally enacted in 1882, was prospective in contemplation, and prohibited the various acts according to conditions as they might exist at the time of their commission. *Ibid.*

4. Ch. 56*a*, Stats. 1898, is not void simply because it fails to provide a method of ascertaining or proving the population and leaves that fact to be proved by the ordinary common-law means of evidence instead of prescribing a statutory method. *Ibid.*

5. The statute regulating the practice of pharmacy (ch. 56*a*, Stats. 1898, as amended by ch. 340, Laws of 1901) exempts from the operation of the general law such persons of good moral character as, previous to the enactment of ch. 167, Laws of 1882, had had ten years' experience as pharmacists. *Held* that, even if such exemption was valid (a point not decided), the only result would be that the liability of one not within the exempted class would remain as it was before the amendment. *Ibid.*

Obligation of contracts. See MUNICIPAL CORPORATIONS, 6.

CONTEMPORANEOUS AGREEMENTS. See BILLS AND NOTES, 1–4.

CONTRACTS.

Requisites and validity: Nature and essentials in general. See BILLS AND NOTES, 1–4. DAMAGES, 2. CORPORATIONS, 23, 27. HIGHWAYS, 8, 10. INSURANCE, 2–16. PATENTS. SALES.

Same: Parties, proposals and acceptances. See BILLS AND NOTES, 1–4.

Same: Mutuality. See COMPROMISE AND SETTLEMENT, 8. EVIDENCE, 10–12. VENDOR AND PURCHASER, 1.

Same: Consideration. See ACCORD AND SATISFACTION. BILLS AND NOTES, 9–11. EVIDENCE, 6–8. FRAUDULENT CONVEYANCES. GUARANTY, 2. PATENTS, 1–3, 5. SALES, 2. SETOFF AND COUNTERCLAIM, 2. VENDOR AND PURCHASER, 2.

Construction and operation. See ACCORD AND SATISFACTION. DAMAGES, 1, 2, 4, 5, 7, 8. EVIDENCE, 6–12. EXECUTORS AND ADMINISTRATORS, 16. INSURANCE, 2–16. LANDLORD AND TENANT. MUNICIPAL CORPORATIONS, 6, 7. VENDOR AND PURCHASER.

Transfer and assignment. See BILLS AND NOTES, 5–11.

Performance or breach. See DAMAGES. EQUITY. LANDLORD AND TENANT, 2. SALES, 2, 3, 11–21. SETOFF AND COUNTERCLAIM.

CONTRIBUTORY NEGLIGENCE. See HIGHWAYS, 16–18. MASTER AND SERVANT, 11. RAILROADS, 6, 10, 11, 13. TELEPHONES. TRIAL, 14, 18.

CONVERSION. See COMPROMISE AND SETTLEMENT, 2. CORPORATIONS, 7. EXECUTORS AND ADMINISTRATORS, 8–11. LIMITATION OF ACTIONS, 11.

CONVEYANCES. See BANKRUPTCY, 1–5. DEEDS. EQUITY. EVIDENCE, 6–8. FRAUDULENT CONVEYANCES. GIFTS. HUSBAND AND WIFE.

JOINT TENANCY. REFORMATION OF INSTRUMENTS. RELIGIOUS SOCIETIES, 3–5, 7, 9. TAX TITLES. TRUSTS AND TRUSTEES, 2. VENDOR AND PURCHASER.

CORPORATIONS.

Capital stock: Subscriptions. See FRAUDULENT CONVEYANCES, 1–3.

Same: Certificates.

1. Certificates of stock in a corporation are mere muniments of title to the shares, which are fractional interests in the corporate property. *Catlin & Powell Co. v. Schuppert,* 642

Members and stockholders: Regulation of conduct of business by courts. See RELIGIOUS SOCIETIES, 1, 6, 8.

2. In the absence of fraud courts cannot engage in regulating the conduct of the business of corporations against the wishes of a majority of the directors and stockholders, so long as the corporation is acting within the scope of its powers. *Figge v. Bergenthal,* 594
3. Where there is not sufficient evidence to sustain a finding that a stock of merchandise of a corporation was carried fraudulently or for an unlawful purpose, but, on the contrary, there was ample evidence to support a finding that it was good business policy to pursue the course adopted, the situation does not warrant a court in interfering with the business of the corporation by ordering a reduction of such stock. *Ibid.*

Same: Rights as between themselves: Settlement and discharge of corporate debts.

4. A stockholder, in that capacity alone, cannot settle and discharge corporate claims. *Petersen v. Elholm,* 1
5. Although two persons own all the stock of a corporation they do not thereby become the corporation, and their individual action in settling a claim of the corporation against one of them does not bind the corporation. *Ibid.*
6. In such case, however, where one was, and continued to be, an officer of the corporation and superintendent of its business, and a settlement arranged between the two was afterwards brought to the notice of the corporation, acquiescence in the transactions and acceptance of the benefits thereby secured bind the corporation. *Ibid.*

Same: Conversion. See COMPROMISE AND SETTLEMENT, 2.

[7. Whether in a civil action against a corporate officer for fraudulent conversion of corporate funds, seeking an accounting and judgment for the amount found to have been converted, the plaintiff cannot recover if the conversion was not fraudulent, *i. e.* if it did not amount to embezzlement, not determined.] *Petersen v. Elholm,* 1

Same: Suing or defending in behalf of corporation. See CORPORATIONS, 10.

Officers: Salaries. See CORPORATIONS, 20, 21.

8. An officer of a corporation while acting as a director cannot fix his own salary so as to bind the corporation in an action by it or by a nonconsenting stockholder in its name challenging the validity of the salary. *Figge v. Bergenthal,* 594

9. In such case, however, where the stockholders ratify the salary so fixed, the act becomes binding on the corporation and all stockholders. *Ibid.*

10. In an action under secs. 3237–3239, Stats. 1898, it appeared that plaintiff had agreed to the salary paid the defendant officers of a corporation, but under a promise that he (plaintiff) should receive a consideration. *Held*, that plaintiff could not be heard in a court of equity, either in his own behalf or that of the corporation, to challenge such salary, at least up to the time of a rescission. *Ibid.*

Same: Fraud: Borrowing on corporate credit.

11. Under the facts, stated in the opinion, a corporation was not injured by improper bookkeeping or by the loan of its credit by being a party to a note. *Figge v. Bergenthal*, 594

12. In such case the corporation was not entitled to interest. *Ibid.*

13. In such case a finding that this and other transactions, stated in the opinion, were fraudulent is *held* unsupported by the evidence. *Ibid.*

14. In such case *held* under the evidence, stated in the opinion, that an injunction restraining defendants from using the credit or property of the corporation on private account should not have been awarded. *Ibid.*

Same: Sales to corporation. See LIMITATION OF ACTIONS, 13–15.

15. While officers of a corporation, because of their fiduciary relation to the corporation, owe the highest good faith, diligence, and endeavors to promote the corporate interests, they are not prohibited from selling their property to the corporation, provided the transaction is open and fair. *Figge v. Bergenthal*, 594

16. Where an officer, holding a majority of the stock of a corporation, sold to it a commodity in which it dealt, on the evidence, stated in the opinion, such transaction is *held* valid and subject to no inference of fraud. *Ibid.*

17. In such case it appeared that during seven years thereafter the corporation was buying the same commodity from other parties, and, in the instant purchase, was simply pursuing its customary business policy. *Held*, if any mistake was made which worked injury to the corporation, that it resulted from error of judgment and not from any fraud on the part of the officer. *Ibid.*

18. A business transaction between a corporation and one of its officers, whereby the latter sells to or buys from the former, is not absolutely void, or even voidable, under all circumstances, and is not to be classed with the transaction of an administrator, executor, or guardian who buys property belonging to the trust estate. *Ibid.*

19. In such case, however, the acts of the officer should be carefully scrutinized, and if it appears that the object of his dealing was for the purpose of gain to himself and loss to the corporation, or the dealing was rendered harmful to the corporation merely because the transaction was with the officer instead of an outside party, the transaction should not be upheld if seasonably questioned. *Ibid.*

Same: Suing in behalf of corporation. See CORPORATIONS, 10.

20. Plaintiff, at the time he bought shares in a corporation, entered into an agreement with the president and secretary, who together held a majority of all the stock, that they would pay him a certain percentage on his interest in the corporation until such time as the president's salary should be reduced one half. *Held*, that a claim for such unpaid percentage could not be determined in an action brought under secs. 3237–3239, Stats. 1898, since such claim, if not void as against public policy, was a personal and not a corporate claim, and not one contemplated or authorized by such statute. *Figge v. Bergenthal*, 594

21. Neither could plaintiff be heard in a court of equity, as an innocent stockholder, on behalf of the corporation in an action to reduce such salary because of a personal grievance of his own. *Ibid.*

Same: Payment of expenses of litigation.

22. In an action under secs. 3237–3239, Stats. 1898, where no cause of action was found to exist against the individual defendant officers, it is not improper or unjust for the corporation to bear the expense of defending the action. *Figge v. Bergenthal*, 594

Foreign corporations. See DAMAGES, 2. INSURANCE, 1, 2.

Same: Right to contract: Interstate commerce.

23. The defendant, a resident of Wisconsin, by letter written from Wisconsin, employed the plaintiff, a corporation residing and operating in New York, as stock broker to purchase for defendant in New York shares of the stock of a corporation foreign to Wisconsin and transmit the same to the defendant in Wisconsin, where defendant would pay through the usual collection agencies. To this the plaintiff, on its part, assented and fully performed in New York all the contract except the act of delivering the muniments of title to and collecting payment from defendant. *Held*, notwithstanding sec. 1770*b*, Stats. 1898, as amended by sec. 27, ch. 351, Laws of 1899, chs. 399, 434, Laws of 1901, ch. 124, Laws of 1903, and ch. 506, Laws of 1905, that the plaintiff was entitled to recover on such contract, since the contract was without the terms of the statute and neither the transmission of the certificates of stock nor the collection of the money due the plaintiff for its services and disbursements in purchasing the shares in New York came within the terms "acquire, hold or dispose of property in this state." *Catlin & Powell Co. v. Schuppert*, 642

24. Such words mean, not that the act of acquisition, but that the property, must be within Wisconsin. *Ibid.*

25. In such statute the words "affecting the personal liability thereof" do not include all contracts for the breach of which the corporation would be liable in damages. *Ibid.*

26. The words of such statute, "affecting the personal liability," used in describing one of the prohibited classes of contracts, are *held* to intend to exclude all unilateral contracts, like bills and notes, all contracts fully executed outside Wisconsin upon which there remains as obligation only payment, or payment and delivery, to be made in this state, and all contracts not by their stipulations imposing duties or liabilities on such foreign corporations. *Ibid.*

27. In such case the transaction between plaintiff and defendant is *held* to constitute an act of commercial intercourse, and hence, as between the parties, an act of interstate commerce. *Ibid.*

CORROBORATION. See FORNICATION.

COSTS.

Right to costs: Persons entitled. See APPEAL, 27. PAYMENT, 1. TAX TITLES, 3.

1. The statute authorizing trial courts to allow partial costs in their discretion in equitable actions applies to actions to enforce mechanics' liens. *Boeson v. Peterson,* 418

2. Where, in an action to enforce a mechanic's lien, the court allowed but $10 for costs and disbursements, it was *held* that the circumstances shown by the record did not so clearly show abuse of discretion as to warrant reversing the action of the trial court. *Ibid.*

Same: On appeal. See APPEAL, 7.

3. Where the appellant has made no attempt in the court below to correct a small error in computation of the damages awarded on a breach of a contract to perform designated work at stipulated prices, on reversal the error is regarded as having been waived, and is not allowed to affect the question of costs in the appellate court. *Spafford v. McNally,* 537

Same: Motion costs. See JUDGMENTS, 3.

Remedies for collection.

4. As a general rule, where a plaintiff has been nonsuited and brings a second action for the same cause, a presumption arises either that the second action is vexatious or that the cause of action is without merit, and hence a court will not allow the plaintiff to proceed with the second action until he has paid the costs of the first. *Odegard v. North Wis. L. Co.* 659

5. Such presumption, however, yields to proof showing that the prosecution of the second action is in good faith, and that the failure of the previous action was not due to infirmity in the cause of action, but to untoward circumstances or excusable mistake. *Ibid.*

6. When in connection with such proof it appears that the plaintiff is absolutely unable to pay the previous costs on account of poverty or want of credit, a case arises where the court in the exercise of a wise and just discretion may fairly allow the second action to proceed notwithstanding the fact that the previous costs are unpaid. *Ibid.*

7. Courts are open to the prosecution of meritorious and *bona fide* causes of action in good faith, and poverty, while it gives no license to any one to vex or harass his neighbor with unfounded lawsuits, alone should not prevent a needy litigant who presents a meritorious cause of action from invoking the courts to do justice between himself and his neighbor. *Ibid.*

8. Under the facts, stated in the opinion, it is *held* there was no abuse of discretion in denying a motion to stay proceedings in an action until the costs of two previous actions, founded on the same cause of action, had been paid. *Ibid.*

COUNTERCLAIM. See NE EXEAT, 7. SALES, 11, 12. SETOFF AND COUNTERCLAIM, 1, 2.

COUNTY COURTS. See APPEAL, 27. EXECUTORS AND ADMINISTRATORS.

COUNTY JUDGE. See OFFICERS, 1, 2.

COUNTY TREASURER. See TAX TITLES, 1.

COURSES AND DISTANCES. See BOUNDARIES, 1-3, 6.

COURT AND JURY. See HIGHWAYS, 13-15, 17, 18. INSURANCE, 16. MALICIOUS PROSECUTION, 1, 2. MASTER AND SERVANT, 2-5. RAILROADS, 6, 8. STREET RAILWAYS, 7. TRIAL, 7, 11-19.

COURTS.
Supreme court. See APPEAL.
Circuit courts. See CORPORATIONS, 2, 3. COSTS, 7.
Federal courts. See BANKRUPTCY.

COVENANTS. See VENDOR AND PURCHASER, 1.

CRIMINAL LAW AND PRACTICE.

Nature and elements of crime in general. See ASSAULT. ASSAULT AND BATTERY. FORNICATION. LARCENY. ROBBERY.

Same: Aid by prosecutor.

1. Where the owner of property, by himself or his agent, actually or constructively, aids in the commission of the offense, as intended by the wrongdoer, by performing or rendering unnecessary some act in the transaction essential to the offense, the would-be criminal is not guilty of all the elements of the offense. *Topolewski v. State,* 244

Indictment and information. See ROBBERY, 2-4.

Trial: Evidence: Other offenses. See APPEAL, 19.

2. On the trial of a person for a particular offense, evidence tending to prove that he has committed other distinct offenses is incompetent and generally prejudicial. The evidence should be confined to the particular offense charged. *Topolewski v. State,* 244

Same: Instructions to jury. See ROBBERY, 5, 6.

Same: Requests for instructions.

3. In a criminal prosecution it was error to refuse a requested instruction, stated in the opinion, such instruction not having been covered by the general charge. *Lipscomb v. State,* 238

CROSS-COMPLAINT. See MUNICIPAL CORPORATIONS, 1.

CROSS-EXAMINATION. See WITNESSES, 1, 4.

DAMAGES.

Grounds. See DAMAGES, 4, 5. DEDICATION. EXECUTORS AND ADMINISTRATORS, 5, 6. HIGHWAYS, 6. MUNICIPAL CORPORATIONS.

1. A holder of security, who is obliged to pay a prior lien in order to protect his own, has no right to damages against a warrantor without allegation and proof of inability to collect his own debt in full after reimbursing himself the amount paid in protection of his security. *Stark v. Huber Mfg. Co.* 432

2. On demurrer to the complaint against a foreign corporation which had not complied with sec. 1770*b*, Stats. 1898, it was al-

leged that a note and mortgage purchased from defendant were thereby void and worthless, whereby plaintiff was obliged to pay certain sums in discharge of an execution levied upon the mortgaged property under a pre-existing judgment against the mortgagors. *Held:*

(1) The complaint failed to show that plaintiff had as yet suffered any loss or damage.

(2) Assuming, as alleged, that the assigned mortgage was wholly invalid and void, conferring no lien at all, there was neither reason nor necessity for plaintiff to discharge any prior liens or incumbrances, since such payment could not be necessary to protect plaintiff's interest, for he had none. *Ibid.*

3. One in peril from breach of a warranty must exercise reasonable diligence to minimize damages, and, if his rights against property or third persons are lost by his own neglect, he cannot hold the warrantor responsible. *Ibid.*

Compensatory damages. See FRAUD, 5. MALICIOUS PROSECUTION, 3.

Measure of damages. See FRAUD, 6. SALES, 3, 4.

4. In an action for the contract price of iron castings of certain required strength, it is not necessary for defendant, in order to enable it to recover for the failure of unused castings to come up to the contract requirements, to prove the amount of defectives, or the diminished value of the castings by reason thereof, with the certainty of a demonstration. All that is required is that such matters be established with reasonable certainty. *Forster, Waterbury Co. v. F. MacKinnon Mfg. Co.* 281

5. In such case defendant counterclaimed for loss occasioned by the failure of unused castings to come up to the contract requirements. Under the evidence, stated in the opinion, *held:*

(1) In the absence of any affirmative evidence to the contrary, it was inferable, with sufficient certainty to sustain a finding, that the same proportion of those not used were likewise defective.

(2) A legitimate basis was established for estimating damages as to the castings not used.

(3) Defendant was entitled to recover the amount per pound the evidence showed to be the difference in value between the castings furnished and those called for by the contract requirements. *Ibid.*

6. In an action by one alleging that he was obliged to pay a prior lien in order to protect his mortgage interest which had been assigned him by defendant, under the facts, stated in the opinion, it was *held:*

(1) Plaintiff's measure of damages, if he was wholly unable to collect his debt, would be the price paid by him to defendant, or at most the amount of the debt.

(2) Plaintiff could not charge defendant with the result of his own gratuitous and useless act in buying up or paying off any other debt of the mortgagors. *Stark v. Huber Mfg. Co.* 432

7. Where one bought for $2,000 an eighth interest in a manufacturing business on the basis of $16,000 of net assets, while the inventory showed somewhat over $18,500, his damages by reason of an overstatement of the resources to the amount of $1,050 is not one quarter of that sum, but one eighth of thirty-two thirty-sevenths thereof. *Steckbauer v. Leykom,* 438

8. Where a mechanic is prevented from completing his contract by acts of the owner, he is entitled to recover the contract price less whatever it would have cost to have completed the work when he was stopped. *Spafford v. McNally*, 537

Excessive damages. See ANIMALS, 3. MALICIOUS PROSECUTION, 3.

9. A servant, sixty-four years of age, was injured by the fall of a scaffold, and under the evidence, stated in the opinion, it was *held* that a verdict of $13,500 was not excessive. *Parker v. Fairbanks-Morse Mfg. Co.* 525

10. In an action by a servant for the loss of his leg, under the facts, stated in the opinion, a verdict for $8,500 is *held* not to be excessive. *Odegard v. North Wis. L. Co.* 659

DAMS. See WATERS AND WATERCOURSES.

DANGEROUS WEAPONS. See ASSAULT. ROBBERY, 2–6.

DEATH. See INSURANCE, 8–16. LIMITATION OF ACTIONS, 11.

DEBTOR AND CREDITOR. See ACCORD AND SATISFACTION. BANKRUPTCY. BILLS AND NOTES. DAMAGES, 1–8. EVIDENCE, 8. FRAUDULENT CONVEYANCES. NE EXEAT. PAYMENT, 1.

DEDICATION.

1. Consent of plaintiff that the defendant city deposit earth upon the margin of her lot for the purpose of furnishing lateral support for the street constitutes a dedication of her property to that extent for a proper public purpose, and she is therefore estopped from requiring the city to remove the earth so deposited or from claiming damages caused thereby. *Williams v. Hudson*, 297

2. In such case allegations of the complaint, merely descriptive of the injuries alleged to follow from an unlawful filling, are *held* insufficient to state a cause of action for negligent construction of the grade on her lot, whereby damage was caused from the flowage of water and the carrying of sand and other material onto her lot. *Ibid.*

DEEDS.

Requisites and validity in general. See GIFTS. REFORMATION OF INSTRUMENTS. TAX TITLES.

Same: Fraud. See BANKRUPTCY, 1, 4, 5. FRAUDULENT CONVEYANCES.

Same: Undue influence: Action to set aside: Presumptions.

1. In case of a conveyance by an aged person, susceptible to undue influence, of his entire property, without consideration, to one in a position of trust and confidence, under suspicious circumstances which satisfactorily suggest the wrong, accompanied by proof of opportunity and disposition on the part of the beneficiary to exert influence, there arises a presumption that the conveyance was so induced, unless the grantee can negative that fact by direct proof. *Quinn v. Quinn*, 548

2. In an action to set aside a deed given under such circumstances, the competent evidence, stated in the opinion, is *held* not to negative such presumption, and to present a situation precluding reversal of a finding of undue influence. *Ibid.*

Same: Form and contents. See EVIDENCE, 6–8.

Construction and operation. See RELIGIOUS SOCIETIES, 3–5, 7, 9.

Same: Loss and relinquishment of rights. See EQUITY, 1–3.

DEFECT. See MUNICIPAL CORPORATIONS, 9.

DEFECTIVE TITLE. See BILLS AND NOTES, 5–9.

DEFENSES. See COMPROMISE AND SETTLEMENT, 1, 3–8. PATENTS, 4. SETOFF AND COUNTERCLAIM, 2.

DEFINITIONS. See WORDS AND PHRASES.

DELIVERY. See BILLS AND NOTES, 1–4. GIFTS. OFFICERS, 2–5.

DEMAND. See LIMITATION OF ACTIONS, 14.

DEMURRER. See APPEAL, 2. DAMAGES, 2. EJECTMENT, 2. LIMITATION OF ACTIONS, 7. PARTNERSHIP, 1. PLEADING, 6.

DEPOSITS. See LIMITATION OF ACTIONS, 11.

DESCENT AND DISTRIBUTION. See EXECUTORS AND ADMINISTRATORS. TRUSTS AND TRUSTEES, 2, 3.

DEVISES. See JOINT TENANCY, 4, 8. WILLS.

DILIGENCE. See ANIMALS, 6. DAMAGES, 3.

DIRECTION OF VERDICT. See APPEAL, 20. COMPROMISE AND SETTLEMENT, 6, 7. HIGHWAYS, 13–15, 17, 18. MASTER AND SERVANT, 5.

DIRECTORS. See CORPORATIONS, 2, 8, 10.

DISABILITIES. See JOINT TENANCY, 8.

DISCHARGE. See BANKRUPTCY, 6, 7.

DISCOVERY.

See LIMITATION OF ACTIONS, 12.

Under sec. 4096, Stats. 1898.

1. The examination of a party under the provisions of sec. 4096, Stats. 1898, is both a special proceeding and a provisional remedy. *Phipps v. Wisconsin Central R. Co.* 279

2. An order requiring the witness to produce books and papers, made in the course of an examination of a party under the provisions of sec. 4096, Stats. 1898, is merely an interlocutory order regulating the manner of procedure upon the examination, is in no sense a final order, and does not in any proper sense grant, refuse, continue, or modify such provisional remedy. *Ibid.*

3. Such order is not appealable under the calls of sec. 3069, Stats. 1898. *Ibid.*

DISCRETION. See CERTIORARI, 5. CONSTITUTIONAL LAW, 2. COSTS, 2, 6, 8. EXECUTORS AND ADMINISTRATORS, 12, 14, 15. HIGHWAYS, 6 (6). INJUNCTION. PLEADING, 8. REFORMATION OF INSTRUMENTS, 2.

DISTRIBUTION. See BANKRUPTCY, 3. EXECUTORS AND ADMINISTRATORS, 2–6. TRUSTS AND TRUSTEES, 2, 3.

DIVERSION. See RELIGIOUS SOCIETIES, 1, 2, 5.

DOCK LINE. See INJUNCTION.

DOCUMENTS. See DISCOVERY, 2.

DOGS. See ANIMALS, 1.

DOWER. See REFORMATION OF INSTRUMENTS, 3.

DUPLICITY. See TRIAL, 26, 27.

EJECTMENT.

Right to action. See EQUITY, 3. LIMITATION OF ACTIONS, 8–10.

1. If a person has the legal title to lands and is entitled to the possession thereof as against another wrongfully withholding the same, and such person's right involves fraud on the part of such other, which right must be established by evidence *aliunde* the record, such person may sue in ejectment for his vindication though he may also sue in equity. *Steinberg v. Saltzman,* 419

Pleading.

2. On an appeal from an order overruling a demurrer to a complaint in ejectment the complaint is *held* to state a good cause of action. *Wisconsin River Land Co. v. Paine L. Co.* 393
3. Where in an action of ejectment the complaint sets out a cause of action based on a tax title, alleges all the facts required by sec. 3077, Stats. 1898, and is sufficient to entitle the plaintiff to recover, its sufficiency is not destroyed by additional allegations that the lands were "vacant and unoccupied" and "that the defendant claims title in fee simple to said lands." *Ibid.*

Evidence. See BOUNDARIES, 4.

ENCROACHMENT. See NAVIGABLE WATERS, 1, 3.

ENTIRETIES. See JOINT TENANCY, 6–8.

EQUAL PROTECTION OF LAWS. See CONSTITUTIONAL LAW.

EQUITABLE BAIL. See NE EXEAT.

EQUITABLE MORTGAGE. See BANKRUPTCY, 5.

EQUITY.

Jurisdiction. See CORPORATIONS, 10, 21. EJECTMENT, 1. FRAUD. JUDGMENTS, 4–8. MUNICIPAL CORPORATIONS, 2. NAVIGABLE WATERS, 1, 3.

Adequate remedy at law.

1. Plaintiff brought an action in equity for breach of condition subsequent, seeking the enforcement of her rights under a deed given by her to defendant, and asked to have it canceled and removed as a cloud on the title. The condition was not embodied in an instrument separate from the deed of conveyance and did not rest in parol. *Held,* that plaintiff had a full and adequate remedy at law and hence could not invoke the jurisdiction of equity for the determination of her rights. *Mash v. Bloom,* 366
2. The grantor in a deed brought an action in equity alleging that the condition of the deed was broken and for that reason she was entitled to have the actual possession restored. *Held,* that proof of such breach would entitle the grantor to judgment declaring the conveyance forfeited and awarding her possession. *Ibid.*
3. Such procedure affords a full, complete, and adequate remedy, enforceable in an action in ejectment, and hence it is error to award judgment in an equitable action canceling the deed and restoring to the grantor, as owner in fee, all her rights in the property. *Ibid.*

Same: Forfeiture.

4. Where a grantee of lands has defaulted in the conditions of the conveyance, the grantor's claim to the right of possession and the grantee's denial thereof operates as a re-entry vesting the title in the grantor, and the rule that equity will not lend its jurisdiction to effect a forfeiture is not violated. *Mash v. Bloom,* 366

ESCAPE. See ANIMALS, 6.

ESTOPPEL. See DEDICATION, 1. WILLS, 1.

EVICTION. See LANDLORD AND TENANT.

EVIDENCE.

Presumptions. See ASSAULT, 3, 4. BILLS AND NOTES, 8. COSTS, 4, 5. DEEDS. EVIDENCE, 5, 16. HIGHWAYS, 4, 6 (4). INSURANCE, 12. LIMITATION OF ACTIONS, 3, 9, 10.

Burden of proof. See ASSAULT, 3, 4. BILLS AND NOTES, 11. INSURANCE, 12. LIMITATION OF ACTIONS, 10. TRIAL, 14, 16–20.

Relevancy, materiality, and competency. See ANIMALS, 4. EVIDENCE, 5, 9, 16. HIGHWAYS, 11, 12, 14. INSURANCE, 2, 13–15. RAILROADS, 2–4. SALES, 17, 19. TRIAL, 3, 4.

1. In an action to enforce the penalty denounced by ch. 56*a*, Stats. 1898, regulating the practice of pharmacy, testimony of a pharmacist as to whether he saw any reason for discriminating between large and small communities is irrelevant. *State v. Evans,* 381
2. In an action against a physician who maintained a pharmacy in a village of more than 500 population, he not being or having in his employ a registered pharmacist, to enforce the penalty denounced by ch. 56*a*, Stats. 1898, a question was asked a witness whether "it would interfere with defendant's practice as a physician if his prescriptions could not be put up at his own store." *Held,* that the question was immaterial. *Ibid.*
3. In an action by a servant for injuries from the defective operation of a machine, evidence that at the time of the trial the machine "worked nice and smooth" is inadmissible, where it appeared there had been material changes in the machine between the time of the accident and that of the trial. *Odegard v. North Wis. L. Co.* 569
4. In such case, however, evidence that the machine did not work perfectly and bothered at times before the changes is *held* admissible. *Ibid.*

Same: Similar facts and transactions. See ANIMALS, 4.

Prima facie evidence. See BILLS AND NOTES, 8, 9. INSURANCE, 9.

Best and secondary evidence. See CONSTITUTIONAL LAW, 4. INSURANCE, 15.

Hearsay. See INSURANCE, 14, 15.

5. Subject to recognized exceptions hearsay evidence is not allowable, and its admission is presumed to be prejudicial unless the contrary clearly appears. *Topolewski v. State,* 244

Documentary evidence: Production of documents. See DISCOVERY, 1, 2. TRIAL, 5.

Same: Certified copies. See INSURANCE, 13.

Parol evidence: Contradicting, varying, or adding to terms of written instruments. See BILLS AND NOTES, 3, 4. EJECTMENT, 1. PARTNERSHIP, 3. SALES, 16, 17.

6. In an ordinary deed of conveyance the recital that there has been paid a consideration, and what that consideration was, is merely a statement of fact theoretically necessary to exist in order that the conveyance may take effect. The correctness of the recital is wholly immaterial. It binds no one as to its correctness, but may be proved, *aliunde*, to have been greater or less or different in character, so long as it is not inconsistent with the existence of some consideration to support the conveyance. *Jost v. Wolf*, 37

7. Where a preliminary land contract recited that the vendee was to pay $5,600 for the land, and the deed of conveyance recited a consideration of $5,500, there is thereby presented no obstacle to proof that the real consideration was $600 in money, the assumption of an existing mortgage, and an agreement by the vendee to hold the property subject to an equity in a third person to acquire the title upon payment of advances made. *Ibid.*

8. In such case the payment of the $600 and the actual assumption of the mortgage left no debt upon which to base a vendor's lien. *Ibid.*

Same: Invalidating written instrument: Public policy.

9. When an agreement is against public policy the parties cannot, by reducing some unobjectionable parts of it to writing, prevent the reception of parol evidence to show the entire agreement, although it may be inconsistent with the written paper. *Twentieth Century Co. v. Quilling*, 318

Same: Separate or subsequent oral agreements.

10. Although a written contract may be the complete and final agreement between the parties at the time of its signature, it constitutes no obstacle to the making of a new, different, or substitutionary agreement thereafter by mutual consent. *Jost v. Wolf*, 37

11. Such subsequent agreement would constitute a new contract, and, if it rested mainly in parol, would be provable by all ordinary means of evidence. *Ibid.*

12. In such case, if the new oral contract consisted in the re-adoption of a plan agreed upon or discussed before the written contract, the details of such plan can be proved to throw light upon the terms of the later oral contract, although they are inadmissible to prove that the written contract did not correctly express the agreement between the parties existing at the time of its execution. *Ibid.*

Opinion evidence: Subjects of expert testimony.

13. In an action by a servant for injuries while working on a saw carriage operated by steam, alleged to have been caused by the fact that the operation of the carriage was not readily controllable, it is *held* to have been error to exclude expert evidence offered by defendant that it was a physical impossibility for the difference in the size of the exhaust pipe and the supply pipe to affect the working of the valve controlling the carriage; that the difference would have no effect upon the accumulation of water; that the valve in use on the apparatus was in general use in Wisconsin and this section of the country; that such valve was manufactured and supplied by reputable mak-

ers of sawmill machinery; as to the effect of the running of the carriage against the bumper on the movement of the plug in the valve; as to the effect of water in the valve on the movement of the sawyer's lever; whether it was possible for the valve to reverse without movement of the lever; whether a certain six-inch pipe was in accordance with the usual construction; and whether it was physically possible for the carriage to run back after striking the bumper without movement of the sawyer's lever. *Odegard v. North Wis. L. Co.* 659

Same: Examination of experts: Competency: Qualifications. See RAILROADS, 2–4.

14. From the evidence of expert witnesses, stated in the opinion, it is *held* that they were qualified, and that their opinion evidence was competent and proper. *Glettler v. Sheboygan Light, Power & R. Co.* 137

15. Where a witness, called to prove market values, appears sufficiently familiar in general with that subject to arouse the judicial duty of the trial court to decide as to his qualifications, the decision of that court will be affirmed unless clearly wrong. *American Foundry and Furnace Co. v. Settergren,* 338

Same: Examination.

16. On the examination of an expert witness, omission to state in a hypothetical question details of evidentiary circumstances and conditions, which, though bearing on the inquiry propounded, are, however, merely cumulative of that which the hypothesis includes, does not affect the competency of the question nor the answer thereto, since the expert must be presumed to have taken into consideration all the facts expressly stated and necessarily implied. *Nelson v. Chicago & N. W. R. Co.* 214

17. Objection to a hypothetical question because assuming facts not supported by the evidence is not tenable where there is some evidence of the facts assumed. *Odegard v. North Wis. L. Co.* 659

18. Where counsel have not specified in what respect a hypothetical question fails to correspond to facts in evidence, an assignment of error thereon will not be considered. *Ibid.*

Weight and sufficiency. See ANIMALS, 1, 3. ASSAULT, 3, 4. BANKRUPTCY, 5. BOUNDARIES, 2, 4–6. COMPROMISE AND SETTLEMENT, 2, 3, 5–8. CORPORATIONS, 13. COSTS, 5, 8. DAMAGES, 1, 2, 4, 5. DEEDS, 2. EVIDENCE, 14, 15. EXECUTORS AND ADMINISTRATORS, 16. FALSE IMPRISONMENT, 1, 2. FORNICATION. FRAUD, 1. FRAUDULENT CONVEYANCES. HIGHWAYS, 13, 15, 16. INSURANCE, 6, 9, 11. LIMITATION OF ACTIONS, 17. MASTER AND SERVANT, 4–6. RAILROADS, 5, 9, 12–14. RELIGIOUS SOCIETIES, 7, 10. ROBBERY, 1. SALES, 6, 10, 20, 21. STREET RAILWAYS, 4, 5. TAX TITLES, 1. TRESPASS. VENDOR AND PURCHASER, 3. WATERS AND WATERCOURSES. WILLS, 3.

EXCEPTIONS. See APPEAL, 4–6.

EXCESSIVE DAMAGES. See ANIMALS, 3. DAMAGES, 9, 10. MALICIOUS PROSECUTION, 3.

EXECUTORS AND ADMINISTRATORS.

Appointment: Collateral attack.

1. When a cause for administering the estate of a deceased person exists and application is made therefor to the proper court,

neither the circumstance that it is not made by a person entitled to the administration or that a person not so entitled is appointed so far vitiates the proceedings as to render the appointment wholly void; it is voidable, only by some appropriate direct proceeding, not by collateral attack. *Steinberg v. Saltzman*, 419

Title to personal estate: Collection and management of estate. See EXECUTORS AND ADMINISTRATORS, 7-11. LIMITATION OF ACTIONS, 11.

2. A settlement made by a railroad company with the sole surviving heir at law of one of its employees, for injuries resulting in the death of such employee, prior to the granting of administration, is binding upon the administrator subsequently appointed, where the assets involved in the settlement are not needed by the administrator for creditors or expenses of administration, and where, if recovered by the administrator, they will go to the heir who made such settlement. *McKeigue v. Chicago & N. W. R. Co.* 543

3. An executor or administrator is invested with the legal title to the personal property of the estate, but holds that title charged with the duty of managing and disposing of the same in accordance with the provisions of the will or of the law. *Ibid.*

4. The duties of an administrator or executor are trust duties. In all essential respects he is regarded in courts of equity as a trustee. *Ibid.*

5. While in an action for the death of plaintiff's intestate, brought to recover damages for the sufferings of the deceased, the damages belong technically to the estate, in the absence of any creditors or other beneficiaries, the recovery is for the sole benefit of the person who is the sole heir at law, and any settlement made by such heir, if *sui juris*, is binding on the administrator. *Ibid.*

6. In such case, if there are creditors or beneficiaries who are interested in the recovery, their rights are not affected by the settlement made by such sole heir at law. *Ibid.*

Same: Possession by heir: Conversion.

7. Upon the death of any person possessed of personal estate the legal title thereto and right to possession thereof vests in his personal representative and can only reach the heirs, ultimately entitled thereto, by due course of administration. *Palmer v. O'Rourke*, 507

8. In the absence of some sufficient equity in favor of an heir who has possessed himself of personalty of a decedent, the mere fact of his having an equitable interest therein as such heir does not deprive the personal representative, duly appointed to administer the estate of which such personalty forms the whole or a part, of an absolute right to recover the value thereof from such heir in case he has converted the same to his own use. *Ibid.*

9. In an action to recover money claimed to have been converted, which had been deposited in the names of decedent and defendant respectively, the complaint is *held* to state a cause of action although it showed that defendant was entitled, as heir, to receive one half the residue of the estate of decedent left after the payment of all claims allowed against the estate and the expenses of administration. *Ibid.*

10. In such case the reasonable inference from the allegation was that the money had been deposited either in the name of decedent, or in the name of defendant as the money of the decedent. *Ibid.*

11. So construed such complaint is *held* not to show any wrongful conversion by defendant at the time the deposit was made. *Ibid.*

Claims: Extension of time for presentation.

12. Under sec. 3840, Stats. 1898, where the facts alleged in a verified petition for an order extending the time for filing claims are not controverted, the county court may, in its discretion, make an order extending the time, although the allegations of the petition are not substantiated by proof other than petitioner's oath of verification. *Seidemann v. Karstaedt,* 117

Same: Sufficiency: Amendment.

13. Where a claim filed against a decedent's estate included enough to suggest that it was based on an agreement of some sort and that the right thereunder was not barred by the statute of limitations, a failure to state therein facts showing expressly a cause of action which accrued within six years prior to the death of decedent is *held* to be a matter of indefiniteness rather than a fatal defect in the cause of action. *Longwell v. Mierow,* 208

14. In such case it was within the court's discretion to allow an amendment alleging that the claim was to mature on the death of the decedent. *Ibid.*

15. In such case, the amendment having been allowed, the fact that it was not formally reduced to writing and filed is *held* to be immaterial, in view of the fact that the cause proceeded to the end on the theory that the amendment had been made. *Ibid.*

16. In an action against a decedent's estate to recover the value of services rendered on an express agreement to pay for the services at the decedent's death, the evidence, stated in the opinion, is *held* to sustain a verdict in favor of the claimant. *Ibid.*

EXEMPTIONS. See CONSTITUTIONAL LAW, 5.

EXPERT TESTIMONY. See EVIDENCE, 13–18. RAILROADS, 2–4.

FACTORS. See TRUSTS AND TRUSTEES, 1.

FALSE IMPRISONMENT.

1. In an action for assault and false imprisonment, the evidence, stated in the opinion, is *held* sufficient to show that the defendant's employee was acting within the scope of his authority. *Johnston v. Chicago, St. P., M. & O. R. Co.* 492

2. In an action for assault and false imprisonment, while an instruction, stated in the opinion, was *held* open to criticism, yet it was not prejudicial to defendant in view of evidence also stated in the opinion. *Ibid.*

3. In such case it further appeared that the assault and imprisonment were inflicted by an employee for the sole purpose of obtaining information sought through investigation as to injuries to the master's property. *Held,* that the employee was performing his duty in his own way, and, although the methods employed were unlawful and unauthorized, they were within the scope of the employee's duty and were, therefore, the acts of the master. *Ibid.*

FALSE REPRESENTATIONS. See FRAUD, 2, 3.

FALSE SWEARING. See INSURANCE, 4–7.

FEDERAL COURTS. See BANKRUPTCY, 3.

FELLOW-SERVANTS. See MASTER AND SERVANT, 5–7.

FINDINGS. See APPEAL, 8–18. BANKRUPTCY, 5. FRAUDULENT CONVEYANCES. JUDGMENTS, 1. TRIAL, 29–32.

FIRE INSURANCE. See INSURANCE, 2–7.

FLOWAGE. See WATERS AND WATERCOURSES.

FOREIGN CAUSE OF ACTION. See LIMITATION OF ACTIONS, 6.

FOREIGN CORPORATIONS. See CORPORATIONS, 23–27. DAMAGES, 2. INSURANCE, 1, 2.

FORFEITURE. See EQUITY, 2–4. INSURANCE, 2–7, 11–15

FORNICATION.

As a rule of law there is no legitimate basis for a conviction in a prosecution of a man for fornication, if he unequivocally denies the charge; there is nothing suggestive to the contrary in the mere meeting of the parties under the circumstances; there is neither any direct evidence of the main fact nor direct corroborating evidence of the female as to circumstances bearing thereon, and her evidence as to such circumstances may be regarded as self-destructive by reason of wilful false swearing at material points. *Hofer v. State*, 576

FRAUD.

See APPEAL, 16. BANKRUPTCY, 1–5. BILLS AND NOTES, 1–4, 7. COMPROMISE AND SETTLEMENT, 2, 4–8. CORPORATIONS, 2, 3, 11, 13, 14, 16, 17. DEEDS. HUSBAND AND WIFE, 5. INSURANCE, 4–7. LIMITATION OF ACTIONS, 12, 13. PARTNERSHIP, 1. PLEADING, 1. SALES, 14. SETOFF AND COUNTERCLAIM, 3.

1. In an action to cancel a note given for subscription to corporate stock, the evidence, stated in the opinion, is *held* to sustain findings that two of the parties appearing on the subscription contract as purchasers of shares were not *bona fide* subscribers. *Luetzke v. Roberts*, 97
2. Where plaintiffs signed a subscription contract for shares of stock in a proposed corporation, upon an agreement between each subscriber, respectively, and the promoters, stated in the opinion, the action of the promoters was *held* a wrong, fraudulent in its nature, which rendered the transaction based on it void as against plaintiffs. *Ibid.*
3. In such case representations by the promoters' agent that the parties whose names were on the subscription contract and who had not signed the notes when plaintiffs executed them were then ready and willing to become joint makers of the notes, and that if they did not sign the notes they would pay in cash for the shares for which they had apparently subscribed, were material, and, their falsity being shown, such representations were fraudulent and rendered the transaction voidable. *Ibid.*
4. In an action in equity to cancel notes on the ground of fraud, on the findings of the court a situation was presented wherein the equitable relief sought could not be awarded, and it was *held* that the only relief available was to offset plaintiffs' liability on the notes by a judgment for pecuniary compensation. *Ibid.*

5. In such case compensatory damages are ascertainable and can be awarded in advance of actual payment of the notes by plaintiffs. *Ibid.*

6. In such case the correct measure of damages is the amount called for by the face of the notes, with interest. *Ibid.*

FRAUDS, STATUTE OF. See GUARANTY, 2. PARTNERSHIP, 3.

FRAUDULENT CONVEYANCES.

See BANKRUPTCY, 1-5.

In an action to set aside a conveyance of lands as in fraud of creditors, the findings of the trial court, that such conveyance was made without consideration upon a secret trust to hold the title for the grantor's benefit and with intent to hinder and delay the plaintiff in the collection of her claim, are *held* supported by the evidence. *Blahnik v. Barta,* 121

FRAUDULENT REPRESENTATIONS. See FRAUD, 2, 3.

GIFTS.

The execution and delivery of a deed, whether to the donee or to some one for him, is an entirely sufficient completed execution of a gift of the land. *Jost v. Wolf,* 37

GUARANTY.

[1. Whether, under the facts stated in the opinion, notice of acceptance by plaintiff of a memorandum of guaranty was necessary in order to charge the defendant with liability as guarantor, not determined.] *Klee v. Stephenson,* 505

2. A written instrument: "R. S. agrees to assume one half of W. S.'s liability under the above guaranty," fails to express any consideration, and hence is void under subd. 2, sec. 2307, Stats. 1898. It is at best merely a promise to answer for the debt of another person. *Ibid.*

GUY WIRE. See TELEPHONES, 1.

HAMMER. See MASTER AND SERVANT, 8, 10.

HANDCAR. See LIMITATION OF ACTIONS, 1-3. RAILROADS, 11-14, 17-19.

HARBORS. See NAVIGABLE WATERS.

HEARSAY. See EVIDENCE, 5. INSURANCE, 14, 15.

HIGHWAYS.

Establishment under statutory proceedings: Second application.

1. Under the limitation of sec. 1283, Stats. 1898, the first application for a highway must have been a valid application—one upon which a legal highway could be laid out. *State ex rel. Limmix v. Clyde,* 159

2. On *certiorari* to reverse the action of a town board in laying out a highway, one ground alleged was that a previous application had been made to lay out the same highway, which had been denied within one year prior to action on the instant applica-

tion. *Held*, that the petition and notice were jurisdictional papers in an adversary proceeding, must substantially comply with the calls of the statute in order to authorize action by the town board, and, although a careful reading of the application and notice might induce one to believe a mistake had been made in naming the quarter section in which the proposed highway was to be located, that the supervisors had no jurisdiction to lay out the highway in question under the first application and notice. *Ibid.*

3. In such case the refusal of the town board to act under the first application and notice did not amount to a refusal to lay out the highway or a decision against the application under either sec. 1269 or sec. 1283, Stats. 1898. *Ibid.*

Same: Variation of route.

4. Where the location of a highway as laid out varies from the route proposed in the application and notice, but the variation is not so great as to make it a materially different highway, in the absence of any showing to the contrary it will be presumed that the variation was reasonable and required by the interests of the public. *State ex rel. Limmix v. Clyde*, 159

Same: Joint meeting of town boards.

5. At the time fixed in the notice of hearing upon an application to the town board of C. to lay out a highway which would connect with one proposed to be laid out in the adjoining town of W., the town board of C. met and held a joint meeting with the town board of W. On *certiorari* to review the order laying out the proposed highway the record simply stated that the two boards met together to consider the application, and did not show that action was taken by the joint body, but on the contrary stated that after such consideration the road in question was laid out by the town board of C. *Held*, that a judgment of affirmance of the action of the town board of C. was right. *State ex rel. Limmix v. Clyde*, 159

Same: Award of damages: Review.

6. A taxpayer as an individual, on behalf of himself and other taxpayers similarly situated, sued out a writ of *certiorari* to review and annul the decision of an appellate jury appointed by the county judge to review an award of damages to A., resulting from the opening of a highway through his premises upon an application signed by relator and others, A. being the appellant. *Held:*

(1) The decision of the jury merely created an ostensible and *prima facie* claim against the town: legal if the decision was valid, no claim in fact or law if the appellate proceedings were void.

(2) The town being a legal person capable of making its own defenses, the effect of the decision of the jury on the plaintiff was neither special, immediate, nor direct. It was not special, for it fell upon him only in common with the great body of taxpayers. It was not direct or immediate, for it fell upon the town and reached the relator only through the general process of taxation.

(3) While taxpayers might in a proper case invoke the aid of the court to prevent the depletion of the common treasury or prevent an illegal charge thereon, the primary duty and right to resist such injury rested on the town itself acting by its con-

stituted authorities, and the relator could not be heard to champion the rights of the town without showing that the officers refused to do so either by words or acts.

(4) Before the relator could suffer any injury from the award of the jury it must be presented either to the town board or to the electors in town meeting, and no presumption exists that either body would allow or pay it if illegal.

(5) If the award were disallowed by the town board or town meeting the claimant, in order to enforce it, must sue upon the award, and in that suit all the grounds of invalidity suggested by the petition or writ would be available for consideration.

(6) The court rightly exercised its discretion in quashing the writ. *State ex rel. Skogstad v. Anderson,* 227

Improvement and repair: Purchase of road machine.

7. When the assessment roll has been corrected by the assessor and delivered to the town clerk pursuant to sec. 1064, Stats. 1898, it is an assessment roll within the meaning of ch. 83, Laws of 1899, notwithstanding it is still subject to correction as to mistakes under sec. 1065. *Pape v. Carlton,* 123

8. If, after the assessment roll has been corrected by the assessor and delivered to the town clerk pursuant to sec. 1064, Stats. 1898, the chairman of the town is petitioned to purchase a road machine under ch. 83, Laws of 1899, the sufficiency of the petition, as to putting him in motion to obligate the town to make the purchase, is to be tested by such roll unless in the meantime another shall have been made. *Ibid.*

9. It is sufficient to render one a competent petitioner under ch. 83, Laws of 1899, that he is a taxpayer of the road district when the petition is certified by the town clerk and presented to the chairman. *Ibid.*

10. In an action for the purchase price of a road machine ordered by the town chairman under the authority of a petition dated June 14, 1900, and certified by the town clerk and presented to the town chairman on August 25, 1900, where the assessment roll of 1900 had been completed and on file prior to the time the petition was so certified and presented, *held:*

(1) An allegation of the complaint, in effect, that the town chairman was "petitioned" on June 14, 1900, either standing alone or in connection with the date of the petition, did not control as to the date when an effective petition was presented.

(2) The language of ch. 83, Laws of 1899, "The chairman of the town board . . . may, upon being petitioned," reasonably points to the time of the certification of the petition for presentation to the chairman.

(3) The assessment roll of 1900 governed. *Ibid.*

Regulation and use: Obstructions and encroachments. See INJUNCTION. NAVIGABLE WATERS. TELEPHONES.

Same: Injuries from defects and obstructions.

11. In an action for injuries caused by a horse taking fright at material placed in a highway, the plaintiff is not prejudiced by the admission of evidence offered by defendant showing the purpose for which the material was placed in the highway, where the complaint alleged that it was so placed for use in repairing a culvert in the highway, although the answer did not allege it was placed there for that purpose. *Carlon v. Greenfield,* 342

12. In such case, were the complaint silent on the subject, such evidence would only be proper if the defendant had alleged such fact to show that the use of the highway for such deposit was within recognized exceptions to the general rule requiring highways to be kept free from obstructions tending to make them unsafe for public travel. *Ibid.*

13. In an action for injuries caused by material deposited in a highway by a contractor engaged to repair a culvert, under the evidence, stated in the opinion, it was error to direct a verdict for the defendant. *Ibid.*

14. In such case the ruling was *held* unobjectionable so far as it related to the length of time the material had been left in the highway, the manner of piling the material, and the leaving of it without a lantern or other signal to apprise travelers of its presence and location in the road, but erroneous in that it did not submit to the jury the question whether the material was unnecessarily dangerously near the traveled track of the highway, making it defective for public travel. *Ibid.*

15. In an action to recover for personal injuries from a defective highway, the evidence, stated in the opinion, is *held* sufficient to support a finding that the highway was defective and unsafe and that the defendant town was negligent in so maintaining it. *Dralle v. Reedsburg,* 347

16. In such action the fact that the plaintiff knew of the defective condition of the highway is *held* insufficient as a matter of law to bar a recovery. *Ibid.*

17. In such action the question whether the plaintiff was exercising such care as persons of common and reasonable prudence would ordinarily exercise under the circumstances shown by the evidence is *held* to be a question for the jury. *Ibid.*

18. In such case it was error to direct a verdict for the defendant. *Ibid.*

HOLDER IN DUE COURSE. See BILLS AND NOTES, 4–11.

HOMESTEAD. See REFORMATION OF INSTRUMENTS, 2.

HUSBAND AND WIFE.

See INSURANCE, 5. JOINT TENANCY, 5–8.

1. If a husband absents himself from home, keeping his whereabouts unknown and leaving his property wholly under the care of his wife, she is his agent by implication of law (*ex necessitate*) to do those things which customarily are delegated to wives having such charge of property. Beyond that the wife cannot bind the husband as his general agent regardless of whether her act to that end be judicious or not from a business standpoint. *Evans v. Crawford County Farmers' Mut. F. Ins. Co.* 189

2. The authority of a wife as agent of her husband by implication of law does not, under any circumstances, extend to selling and conveying his real estate. *Ibid.*

3. The rule that, if a wife contracts, assuming to act for her husband, so that the benefit comes to his hands and he does not disavow within a reasonable time, he is bound as having authorized the contract, does not apply to acts of the wife where the benefit comes to her. In such circumstances, as to general

contracts, ratification by some affirmative act with knowledge of the facts recognizing the wife as having had authority to make the agreement is necessary to bind the husband. *Ibid.*

4. If a wife is left in charge of insured property and a loss occurs, and the husband from the circumstances of his situation cannot be reached so as to enable him to make the proofs of loss, the wife may do so by implied appointment. *Ibid.*

5. An agent, *ex necessitate*, to make proofs of loss under an insurance policy has no apparent authority beyond that necessary to effect the object of the implied appointment. If in making the proofs she commits a fraud it does not become that of the husband unless he becomes a party to the deceit by ratifying her act with knowledge of the facts. *Ibid.*

HYPOTHETICAL QUESTIONS. See EVIDENCE, 16–18.

ICE. See BOUNDARIES, 3. TRESPASS.

IDENTITY. See REFORMATION OF INSTRUMENTS, 1.

IMPEACHMENT.
Of settlement. See COMPROMISE AND SETTLEMENT, 4–8.
Of witnesses. See INSURANCE, 13. WITNESSES, 1.

IMPLIED AUTHORITY. See PAYMENT, 2.

IMPRISONMENT. See FALSE IMPRISONMENT. OFFICERS, 3, 4.

IMPROVEMENTS. See MUNICIPAL CORPORATIONS, 1–8. PARTIES, 1.

INCOMPATIBLE OFFICES. See OFFICERS, 1.

INCOMPETENCE. See MASTER AND SERVANT, 5–7. TRIAL, 22, 28.

INFANTS. See STREET RAILWAYS, 3–5, 7.

INFORMATION AND INDICTMENT. See ROBBERY, 2–4.

INJUNCTION.

See CORPORATIONS, 14. JUDGMENTS, 4–8. LOGS AND TIMBER, 2. WATERS AND WATERCOURSES.

1. A city, under its charter authority, established a permanent dock line along a navigable river. Prior thereto piles had been driven so as to form a structure or dock platform extending into the river eleven feet beyond such dock line. This structure had not been interfered with by the public authorities, either federal, state, or municipal, for upwards of forty years. The municipal authorities brought an action to enjoin abutting owners from erecting a proposed building and from placing obstructions in the eleven-foot space, and to compel the removal therefrom of piles and other obstructions placed by them. A temporary injunction was granted *ex parte*, which on hearing was made permanent *pendente lite*. *Held*, that it was an exercise of a wise judicial discretion to maintain the existing conditions by a properly guarded restraining order. *Milwaukee v. Gimbel Bros.* 31

2. In an action by a municipal corporation to restrain the obstruction of a navigable highway, the complaint alleged that all structures at the place in question, ancient or in progress, obstructed navigation and were within the limits of the river. *Held*, that denials thereof, in answer and affidavits presented on a motion to dissolve a temporary injunction, only served to raise

an issue on that subject, and did not warrant a reversal of an order making the temporary injunction permanent *pendente lite*. *Ibid.*

INSPECTION. See MASTER AND SERVANT, 8–10.

INSTRUCTIONS TO JURY. See ANIMALS, 2. APPEAL, 4. BOUNDARIES, 3. FALSE IMPRISONMENT, 2. INSURANCE, 12. MASTER AND SERVANT, 1–3, 10. MUNICIPAL CORPORATIONS, 10. RAILROADS, 7, 8. ROBBERY, 5, 6. TRIAL, 7–23.

INSURANCE.

Mutual companies.

1. Secs. 1941—1 to 1941—13 and 1945*a*, Stats. 1898, respecting "mutual companies in cities and villages," have reference to insurance companies organized under the laws of Wisconsin only, and have no reference to foreign mutual fire insurance companies. *Waukau Milling Co. v. Citizens' Mut. F. Ins. Co.* 47

FIRE.

Application. See INSURANCE, 2.

Avoidance: Misrepresentations.

2. Sec. 1945*a*, Stats. 1898, excepts from its operation, among other insurance corporations, mutual companies in cities and villages. Plaintiff signed an application, addressed to an Ohio mutual insurance company, requesting $4,000 of insurance on its flouring mill and represented that when the mill was not in operation it maintained therein a watchman. The agent, on receipt of such application, placed $2,000 of the insurance in the Ohio company, and $1,000 each in Wisconsin city mutual companies. In an action to recover for a loss under such policies the defendants offered proof of the application and its falsity. The application was not attached to the Wisconsin policies or referred to therein. The testimony was ruled out. *Held:*

(1) The ruling was proper as to the Ohio company, since it was not within the exceptions of sec. 1945*a*.

(2) The ruling was also proper as to the domestic companies, since they were not parties to the application addressed exclusively to the Ohio company. *Waukau Milling Co. v. Citizens' Mut. F. Ins. Co.* 47

Forfeiture of policy: Breach of promissory warranty, covenant, or condition subsequent.

3. Policies of insurance of the Wisconsin standard form provided, among other things, that the entire policy, unless otherwise provided by agreement indorsed thereon or added thereto, should be void if the subject of insurance were a manufacturing establishment and it ceased to be operated for more than ten consecutive days. The risk covered a flouring mill operated by water power. By reason of severe weather the water in the mill race froze, and the insured was therefore unable to operate the mill for more than ten consecutive days, but was operating it when the loss occurred. The mill was not in operation when the agent examined the premises. *Held:*

(1) The specified clause in the policies must be given a reasonable construction in the light of the conditions attending the subject matter of the contract and within the contemplation of the parties when the contracts were made.

(2) The cessation of operation covered by the policies had no reference to such cessation as occurred in the usual course of the business of the insured or as arose from causes beyond its control.

(3) The fact that the mill could not be operated in severe weather on account of lack of power was an existing fact and known to the insurance companies at the time of issuing the policies, and therefore the policy provision respecting nonoperation did not apply. *Waukau Milling Co. v. Citizens' Mut. F. Ins. Co.* 47

Same: Fraud: False swearing. See HUSBAND AND WIFE, 5.

4. The terms of an insurance policy providing that false swearing of the assured in making the proofs of loss shall avoid the policy do not apply to an agent *ex necessitate* to make such proofs, unless the principal, with knowledge of the facts, ratifies the agent's act. *Evans v. Crawford County Farmers' Mut. F. Ins. Co.* 189

5. In case of the commission of a fraud by an agent as above suggested and the husband seeks to enforce the policy in good faith according to the proofs, he does not become a party to the deceit by the mere fact that he has knowledge of the claim of the insurer. So long as he proceeds reasonably, in good faith, to enforce his claim he is not a participant in the fraud of the agent by ratification. *Ibid.*

6. In an action to recover for a loss under a policy insuring a cheese factory standing on leased ground, under the evidence, stated in the opinion, it is *held* that charges of intentional and fraudulent withholding of knowledge in relation to the title to the property, or of other facts which the insured knew, and knew to be material to the risk, were not sustained. *Roloff v. Farmers' Home Mut. Ins. Co.* 402

7. When an applicant for insurance has answered truthfully all questions submitted to him and has not suppressed any fact within his knowledge tending to enhance the risk, he has performed all that is required of him, and if more information is necessary to a full understanding of the risk it is the duty of the insurer to seek it, or at least to ask for it. *Ibid.*

Proofs of loss. See HUSBAND AND WIFE, 4, 5. INSURANCE, 12. VENDOR AND PURCHASER, 6.

LIFE.

Notice and proofs of loss: Amendment and supplemental proofs.

8. Under the regulations of a mutual benefit society its contracts of insurance were payable within ninety days after the receipt of proofs of death. The original proofs were received nearly seven months prior to the commencement of the action, but an amendment thereto was received less than ninety days before the action was commenced. *Held*, that the amendment did not operate as an extension of the time of payment or of the time for the commencement of the action, and therefore the court did not err in its refusal to abate the action on that ground. *Rohloff v. Aid Association for Lutherans,* 61

9. Under a certificate in a mutual benefit society governing liability in case of the death of a member by suicide, the original proofs of death contained a statement in a physician's affidavit, in answer to a question as to the direct cause of death: "Gunshot wound in heart. Case of suicide," and also a statement of the

beneficiary that the insured "was killed by shooting himself in the heart, according to verdict of coroner's jury." Thereafter the beneficiary, who had no personal knowledge of the manner of assured's death, by amendment stated that she made such original proofs without fully "comprehending or understanding the meaning and import of the same," and that the statement was based on rumors and current talk among citizens. *Held:*

(1) Such proofs, at most, were mere *prima facie* evidence of the facts therein stated.

(2) The court did not err in refusing to abate the action or to grant a nonsuit. *Ibid.*

10. A second proof of death does not nullify a prior proof returned by the company, but such proofs are to be taken together, as supplying each other's defects, and if, combined, they answer the requirements of the policy, the law is satisfied. *Ibid.*

Forfeiture of policy: Suicide.

11. In an action on a benefit certificate the sole defense was suicide. The jury returned a verdict that the insured's death was not "caused by suicide, whether sane or insane." Error was assigned because the court refused to set aside the verdict and grant a new trial. *Held*, that the verdict was sustained by the evidence stated in the opinion. *Rohloff v. Aid Association for Lutherans*, 61

12. In an action on a benefit certificate where the only defense was suicide of the member, the court correctly instructed the jury as to the burden of proof. The proofs of death and amendments thereto did not deny the fact of suicide nor withdraw a statement of suicide made in the original proofs, and the defendant requested no instructions as to the proofs of death being considered as evidence in the case. *Held* that, the determination of the question whether the deceased intentionally killed himself being for the jury under the instructions of the court, any presumption of suicide arising from the proofs of death was not stronger than the general presumption against suicide, and did not shift the burden of proof. *Ibid.*

13. In an action on a benefit certificate where the defense was suicide, a certified copy of the certificate of death made by the health officer, who was also a witness for the plaintiff, was offered, not by way of impeachment, but as original testimony, and was *held* incompetent. *Ibid.*

14. In an action on a benefit certificate where the defense was suicide, it is competent to show that the deceased was short in his accounts with a church, but testimony of a trustee that he had made partial inquiries among members of the church and found that certain of them claimed to have made payments to the deceased and taken receipts therefor is mere hearsay. *Ibid.*

15. In such case the receipts themselves are the best evidence. *Ibid.*

ACCIDENT.

Exceptions in policy: Robbery. See ACCORD AND SATISFACTION, 2.

16. In an action upon an accident insurance policy limiting the loss in event of death due to injuries intentionally inflicted upon the insured by any other person, except assault committed for the sole purpose of burglary or robbery, it appeared, among other things, that the insured received a cruel and intentional blow from a third person, after such third person had taken from the possession and against the will of the insured certain per-

sonal property belonging to the insured, and that the insured's death was the result of such blow. *Held*, that the question whether the acts of the third person were for the sole purpose of robbery was one of fact for the jury. *Weidner v. Standard Life and Accident Ins. Co.* 10

INTENT. See FRAUD, 6. ROBBERY.

INTEREST. See CORPORATIONS, 12. TAX TITLES, 2.

INTERLOCUTORY ORDERS. See DISCOVERY, 2.

INTERSTATE COMMERCE. See CORPORATIONS, 27. NAVIGABLE WATERS, 2.

INTOXICATING LIQUORS.

Licenses: Revocation: Mandamus.

1. It is the settled law of Wisconsin that *mandamus* will lie to compel the common council of a city to revoke a liquor license in a case where, upon complaint duly made, the facts requiring such revocation are established beyond dispute. *State ex rel. McKay v. Curtis*, 357
2. Although *certiorari* is a complete and adequate remedy for one who has been wrongfully deprived of his license, it is not a complete and adequate remedy where a common council dismisses proceedings for the revocation of a license when it should have revoked the license, since a judgment reversing that dismissal is barren of any substantial result except to remove a possible bar to the beginning of a new and independent proceeding for revocation. *Ibid.*
3. The word "order" in sec. 1558, Stats. 1898, is a word of broad and general meaning, includes all commands, precepts, or rules made by competent authority, and hence includes an ordinance passed by the board of aldermen of a city which has been approved and published so as to become valid. *Ibid.*
4. If such an ordinance is within the power of the common council it is an *order* "made pursuant to law." *Ibid.*
5. A common council having duly enacted and published an ordinance prescribing the hours of closing and opening for saloons, complaint was made to the common council that a licensee was guilty of a violation of such ordinance. On the hearing the evidence clearly showed such violation, but the common council nevertheless refused to revoke such license. *Held*, that the action of the common council could be corrected and coerced by *mandamus*. *Ibid.*
6. In such case the complaint was radically defective, in that it charged a sale of liquor after the prescribed hour of closing but failed to charge a sale thereafter and before the hour prescribed for opening. On the hearing before the common council no objection was made to the sufficiency of the complaint, and the answer and proofs showed a clear violation of the ordinance. *Held*, under the liberal rules of secs. 4658, 4659, 4706, Stats. 1898, requiring defects or imperfections in matters of form which do not tend to prejudice the defendant to be disregarded and permitting amendments, that a peremptory writ of *mandamus* requiring the common council to revoke the license was rightly ordered by the circuit court. *Ibid.*

JOINDER of parties. See MUNICIPAL CORPORATIONS, 11. PARTIES.

JOINT MEETINGS of town boards. See HIGHWAYS, 5.

JOINT TENANCY.

1. A joint tenancy by the common law is one where the interests are created by one and the same person and by one and the same conveyance and commence at one and the same time and are held by one and the same possession, and so have the four unities of interest, title, time, and possession. *Bassler v. Rewodlinski,* 26

2. A joint tenancy by the common law differs from others in that if the four unities continue till the death of one of the parties, the other or others immediately become the owners of such interest as joint tenants by right of survivorship. *Ibid.*

3. Anything which destroys the unity of title or interest, as by alienation of one joint tenant, makes the owners of the several interests a tenant in common with the remaining joint tenant. *Ibid.*

4. There can be no destruction of a joint tenancy by devise, since the right of survivorship takes precedence thereof. *Ibid.*

5. Joint tenancies, according to the common law, except as expressly declared, were abolished generally by sec. 2068, Stats. 1898, but an exception was made by sec. 2069 as to husband and wife. *Ibid.*

6. At the common law, circumstances making a joint tenancy generally, as to husband and wife, make them tenants by the entireties, differing from joint tenancies, in that there is no right of severance, terminating the right of survivorship. *Ibid.*

7. The added element mentioned, creating tenancies by the entirety, has not existed in this state since the revision of the statutes of 1878. Since that time such circumstances as by the common law would make husband and wife tenants by entireties, make them joint tenants. *Ibid.*

8. A married woman joint tenant is under all the disabilities of a joint tenant by the common law. She cannot under the statute, as regards her capacity to take, hold, enjoy, and convey property, devise her interest held as joint tenant. She has the same right as if she were unmarried, which would not include that of devising property held in joint tenancy. *Ibid.*

JUDGMENTS.

On trial of issues. See FRAUD, 4–6. HIGHWAYS, 5. MUNICIPAL CORPORATIONS, 8. PARTIES, 2. PROCESS, 1. RELIGIOUS SOCIETIES, 11. TAX TITLES, 3.

Entry: Notice. See APPEAL, 21.

Opening and vacating.

1. The clerk entered a judgment under the mistaken impression that findings filed with him were signed by the trial judge and did not discover that they were not until after the record had been made up. Under the facts, stated in the opinion, *held,* that the judgment so entered by the clerk was without authority and a nullity. *Sackett v. Price County,* 637

2. In such case the court had jurisdiction to vacate the judgment and expunge it from the record after the term at which it was entered. *Ibid.*

3. In such case it further appeared that the judgment creditor had filed a transcript of the judgment docket with the county clerk after a motion had been made to vacate such judgment and stay proceedings on the part of the judgment creditor, although such motion had not then been heard or decided. *Held* that, the judgment being void, the motion and stay were proper, and no error was committed in allowing the judgment debtor costs on its motion. *Ibid.*

Equitable relief: Independent action: Parties.

4. One not a party to an action in which a judgment has been rendered, who is interested in opposing the enforcement thereof, where such enforcement as to him would be unjust because the judgment has been paid or never had been a lien on or claim against any property of his, and where the judgment may be enforced, nevertheless, to his prejudice, as an existing indebtedness, is so situated that he may apply by petition for relief in that action. He cannot bring an independent action in equity for such relief. *Jackson Milling Co. v. Scott,* 267

5. In such case the application for relief cannot be dismissed because the applicant is not a party to the action. The proceeding is proper whether the applicant be a party to the action or a stranger. *Ibid.*

6. In such case the expression "stranger" refers to one not a party to the action but interested, nevertheless, in preventing the enforcement of the judgment, either at all, or in the way threatened or attempted. *Ibid.*

7. The right to prevent the inequitable enforcement of a judgment must be enforced by motion in the action in which the execution was issued. A separate action for such purpose cannot be maintained. *Pleshek v. McDonell,* 445

8. This rule applies where a circuit court is invoked to enjoin the enforcement of a judgment by an independent action in the same court. *Ibid.*

JURISDICTION. See APPEAL, 3. BANKRUPTCY, 3. CORPORATIONS, 2, 3. EQUITY, 1–3. HIGHWAYS, 2. JUDGMENTS, 2. MUNICIPAL CORPORATIONS, 2. OFFICERS, 2–4. PROCESS. REMAINDERS. WILLS, 3.

JURY. See APPEAL, 12. MECHANICS' LIENS.

JUSTICES OF THE PEACE. See OFFICERS, 1.

JUSTIFICATION. See ASSAULT AND BATTERY, 1.

LABOR UNIONS. See ASSAULT AND BATTERY.

LACHES. See CORPORATIONS, 19. PLEADING, 3.

LAND CONTRACTS. See EVIDENCE, 7. VENDOR AND PURCHASER.

LANDLORD AND TENANT.

Eviction.

1. Where a tenant, as part of his covenants, agreed to build a tobacco shed, and the landlord gave notice to a lumber dealer, with whom the tenant was negotiating for material for the shed, that he was the owner of the premises and would not pay for the material to be so furnished, the landlord was within his rights, and the fact that the lumber dealer thereafter refused to furnish and sell to the tenant the material under arrangements theretofore made did not prevent the tenant from secur-

ing the necessary material from the dealer upon other conditions, or from purchasing it in the open market. *Buhler v. Smith*, 488

2. Such acts on the part of the landlord did not constitute a breach of the lease or grounds for its abandonment by the tenant. *Ibid.*

LARCENY.

See MALICIOUS PROSECUTION.

In a prosecution for larceny the prosecutor, a packing company, procured D., its employee, to arrange with defendant for the latter to consummate, as he supposed, larceny of the prosecutor's goods. Defendant in the course of the negotiations so sanctioned by the prosecutor suggested to D. the plan to be followed, which was agreed upon between the two, each to be an actor in the matter. Subsequently the plan was sanctioned by the prosecutor, the purpose on the part of the prosecutor being to entrap and bring defendant to justice. The prosecutor carried out the part of such plan necessary to its consummation assigned to it in the agreement between defendant and D., defendant not knowing that the prosecutor was advised of the impending offense, and at the finality caused one of its employees, tacitly at least, to consent to the taking of the goods, such employee not knowing the real nature of the transaction. *Held:*

(1) The conduct of the prosecutor took from the transaction the element of trespass or nonconsent essential to the crime.

(2) When D. agreed to procure the prosecutor to do the acts necessary for defendant to consummate his part of the plan, the prosecutor in legal effect agreed thereto.

(3) The acts of the prosecutor constituted consent to the appropriation of the goods by defendant. *Topolewski v. State*, 244

LATERAL SUPPORT. See DEDICATION, 1.

LAW OF THE CASE. See APPEAL, 23.

LICENSES. See INTOXICATING LIQUORS, 1, 2, 5, 6.

LIENS. See DAMAGES, 1, 2. EVIDENCE, 8. MECHANICS' LIENS.

LIFE ESTATES. See REMAINDERS.

LIFE INSURANCE. See INSURANCE, 8–15.

LIMITATION OF ACTIONS.

Performance of condition: Notice.

1. Under sec. 4222, Stats. 1898, a notice addressed to the defendant, declaring that plaintiff demanded satisfaction from the defendant for injuries received by him in a place described, in the performance of his duties as an employee, and that he was injured by a handcar rolling upon and over him down an embankment, is not insufficient because it failed to state, in terms, that the plaintiff claimed that the damage was caused by the defendant. The statute does not require that the notice shall so state. *Hardt v. Chicago, M. & St. P. R. Co.* 512

2. Under sec. 4222, Stats. 1898, service of such notice upon the defendant corporation sufficiently informs it of the claim that the damages were caused by it. *Ibid.*

3. Notice of an injury, claimed to have been caused by a handcar rolling upon and over plaintiff, and given under the requirements of sec. 4222, Stats. 1898, was alleged to be defective in that it did not, in terms, declare that the handcar was precipitated onto the plaintiff by the negligence of the defendant. In an action for such injuries it was amply proved that full disclosure and explanation were made to defendant's special agent within a few days after the accident. *Held*, that defendant could not have been misled by any such omission in the written notice, nor could any intent to mislead be presumed. *Ibid.*

4. Under sec. 4222, Stats. 1898, as amended by ch. 307, Laws of 1899, no notice is necessary where the plaintiff had brought an action within one year after the happening of the event causing such damages, wherein he was nonsuited, although the instant suit for the same cause of action was begun more than one year after the event causing the damages. *Odegard v. North Wis. L. Co.* 659

5. Under such statute it is not essential that the previous complaint should have alleged the same ground of negligence as that upon which recovery in the subsequent action is obtained. *Ibid.*

Same: Foreign cause of action.

6. Subd. 5, sec. 4222, Stats. 1898, is a limitation statute admitting of no exception, applies to both foreign and domestic causes of action, and acts like any other statute of limitations, extinguishing the right in a domestic cause of action as to all jurisdictions, and extinguishing the right in a foreign cause of action sought to be enforced in this state by a non-resident, as far as its enforcement in our courts is concerned. *Arp v. Allis-Chalmers Co.* 454

Limitations applicable to particular actions: Tax titles. See INJUNCTION, 1.

7. In an action of ejectment plaintiff's title was based on tax deeds and in its complaint it pleaded the three years' statutes of limitation contained in secs. 1, 2, ch. 309, Laws of 1880, and secs. 1187, 1188, S. & B. Ann. Stats. and Stats. 1898. On demurrer that the cause of action alleged in the complaint was barred by the same three years' statutes of limitation, it was *held* that the plaintiff and its grantors were entitled to the protection of such statutes, and that the cause of action alleged in the complaint was not barred. *Wis. River L. Co. v. Paine L. Co.* 393

Computation of period of limitation: Accrual of right of action. See TAX TITLES, 3-5.

8. In an action of ejectment it appeared, among other things, that there was more than twenty years' inclosure and physical occupation for a pasture by the defendant and a series of grantors in conveyances describing a tract of land not including that in dispute, but lying immediately south of and inclosed and occupied with it, and that from each such grantor to his grantee there was delivered the actual physical possession without interval, break, or interruption. *Held*, that thereby was created privity of possession justifying the tacking of each possession to its predecessor. *Closuit v. John Arpin L. Co.* 258

9. In such case the occupancy presented all the characteristics usual in occupation by the owner of such land, and while presumptively it was in subordination to the true legal title, yet when

it was shown that the occupancy had continued for twenty years, a contrary presumption arose to the effect that at all times the acts of occupancy had been adverse to the true title and founded upon some claim of exclusive title in the occupant. *Ibid.*

10. In such case the burden is thereby cast upon those disputing the adverseness of the possession to overcome such presumption by affirmative proof. *Ibid.*

Same: Death and administration. See EXECUTORS AND ADMINISTRATORS, 13.

11. In an action against an heir for conversion of money deposited in a bank, the complaint alleged that defendant wrongfully withdrew from the bank and converted to his own use part of the money within one year before decedent's death, and that the balance of the deposit was so withdrawn and converted six days after her death, both conversions occurring more than seven years and less than eight years before an administrator was appointed. *Held:*

(1) As to the first withdrawal and conversion the right of the administrator to recover was barred by sec. 4222, Stats. 1898.

(2) The limitation of sec. 4222, Stats. 1898, was not extended under sec. 4234 by the death of decedent, since the death did not occur during the last of the six years after the right of action accrued.

(3) As to the withdrawal and conversion after the death of decedent, the cause of action was not barred, the situation being governed by sec. 4251. *Palmer v. O'Rourke,* 507

Same: Fraud and concealment of cause of action.

12. Under subd. 7, sec. 4222, Stats. 1898, where the remedy at law and that in equity are concurrent upon the same state of facts, the action in equity is barred, irrespective of the discovery of the facts constituting the fraud, when the action at law is barred. *Figge v. Bergenthal,* 594

13. In an action brought under the provisions of secs. 3237–3239, Stats. 1898, based on alleged fraud of the managing officers of a corporation, it was established that the directors and at least a majority of the stockholders, including the plaintiff, knew of the alleged fraud seven years before the action was commenced. *Held,* that the action was barred under the provisions of subd. 7, sec. 4222, Stats. 1898. *Ibid.*

14. In such case the accrual of the right of action did not depend on a prior demand and refusal. *Ibid.*

Same: Mutual open accounts.

15. In such case the cause of action was *held* not to be based on any right to enforce a contract obligation against the corporate officers, but upon fraud, and hence, although the defendant officers had a mutual open account current with the corporation, the provisions of sec. 4226, Stats. 1898, did not prevent the bar of sec. 4222. *Ibid.*

16. Where a balance in a mutual account current between parties is stated, the six-year statute of limitations commences to run as to all transactions included in the account up to that time. *Ibid.*

Same: Interruption.

17. In an action of ejectment one defense was twenty years' adverse possession. The court made no specific finding thereon, but found generally that the allegations of the answer were unproven. On review of the evidence, stated in the opinion, it was *held* that it was insufficient to establish a surrender or interruption of the adverse possession established by defendant, and, there being nothing to indicate that other or different evidence could be produced, judgment was ordered confirming defendant's title. *Closuit v. John Arpin Lumber Co.* 258

LOGS AND TIMBER.

1. The meaning of the word "timber" has more or less flexibility, depending upon time, place, and circumstances, as well as the language of the instrument in which it is employed. *Fogo v. Boyle,* 154
2. Under a contract conveying "all the timber" on the land described, the same to be removed by a certain date, the evidence, stated in the opinion, is *held* to sustain a judgment denying an injunction to restrain the cutting of standing saplings, small trees, or any other trees more suitable for cord wood, fire wood, pole wood, or underbrush than for timber. *Ibid.*

MACHINERY. See MASTER AND SERVANT, 1–4. PLEADING, 4, 5. TRIAL, 18, 19, 21, 22.

MALICE. See MALICIOUS PROSECUTION.

MALICIOUS PROSECUTION.

1. In an action for malicious prosecution based on the prior prosecution of plaintiff for larceny, it appeared that defendant failed to make full and fair disclosure of material facts in obtaining advice of attorneys, and under the inferences, supported by the evidence stated in the opinion, it was *held* that the question of defendant's liability in instituting the criminal proceeding maliciously and without probable cause was properly submitted to the jury. *Haas v. Powers,* 406
2. In an action for malicious prosecution, the defense of having acted upon the advice of counsel is not available unless defendant fully and fairly stated the material facts and his knowledge of the transactions to counsel, and such advice led him to the honest belief that plaintiff was guilty of the offense of which he complained against him. If the evidence on this subject fails to establish such facts clearly and without dispute, then it must be left for decision to the jury. *Ibid.*
3. In an action for malicious prosecution a verdict of $400, assessed as plaintiff's compensatory damages, under the facts is *held* not to be excessive. *Ibid.*

MANDAMUS.

See INTOXICATING LIQUORS, 1, 5. 6.

1. The participating justices being equally divided on the question of exercising the court's power of superintending control by way of *mandamus* to compel a circuit court to vacate orders

discharging defendants, charged with obtaining a county order by false pretenses, to reinstate the action, and to proceed with the trial thereof, the proceeding was dismissed. *State ex rel. McGovern v. Williams*, 588

2. For extended citation of authorities, see briefs. *Ibid.*

MARKET VALUE. See EVIDENCE, 15.

MARRIED WOMEN.

See HUSBAND AND WIFE. INSURANCE, 5. JOINT TENANCY, 5–8. REFORMATION OF INSTRUMENTS, 2, 3.

A married woman has a right to acquire title to real property by accepting a warranty deed from a tax-title grantee and paying therefor from her own separate estate. *Brunette v. Norber*, 632

MASTER AND SERVANT.

Master's liability for injuries to servant: Places for work. See EVIDENCE, 13. RAILROADS, 9–20. TRIAL, 18, 19.

1. While the rule as to a master's measure of duty in furnishing a servant a reasonably safe place to perform his duties, *i. e.* that the master use ordinary care in furnishing a reasonably safe place, and that such duty is absolute and not dependent on the degree of care exercised by the master in performing it, is unquestionably correct, submission to the jury of instructions as to the measure of the master's duty is required only when there is credible evidence in the case that would justify the jury in drawing the inference that the master, when an accident occurred, either had or had not performed his duty to the servant of furnishing him such reasonably safe place. *Parker v. Fairbanks-Morse Mfg. Co.* 525
2. In such case if the evidence permits of no other inference than that the master failed in this duty to the servant, it devolves upon the court to determine that question as matter of law, leaving nothing for the jury to pass upon in respect to it. *Ibid.*
3. Under such a state of the evidence, submission of the issue to the jury under erroneous instructions is immaterial error. *Ibid.*
4. When, in an action by a servant for injuries sustained from the collapse of a defective scaffolding erected by the master, no other inference can be drawn than that the master did not furnish the servant a reasonably safe place to work, it is *held* that it was the duty of the court to declare, as matter of law, that the master was guilty of negligence. *Ibid.*

Same: Tools, machinery, and appliances. See EVIDENCE, 3, 4. PLEADING, 4, 5.

Same: Fellow-servants.

5. In an action by a servant for injuries, plaintiff alleged the defective operation of a steam sawmill carriage and also the incompetence of defendant's engineer in charge of the carriage at the time of the accident. *Held*, under the evidence, stated in the opinion, that the questions whether the alleged defective

operation of the steam valve was not in part the cause of the engineer's failure to seasonably reverse the lever controlling the machinery; whether the engineer was incompetent; whether such incompetence was known or should have been known to defendant, and whether the accident was either wholly or partially the result of such incompetence, were proper questions to submit to the jury, and that it was not error to refuse to direct a verdict in favor of defendant on the ground that no negligence was shown, or that, if negligence was shown, it was not the proximate cause of the injury. *Odegard v. North Wis. L. Co.* 659

6. In an action by a servant for injuries alleged to have been caused, in part, by the incompetence of defendant's engineer, a question submitted as part of the special verdict asked whether the injury was caused by the incompetence or *want of skill* of the engineer. *Held*, that the sole inquiry in this respect was whether the injury was proximately caused by the *incompetence* of the engineer, and that the question should be so framed as to put that inquiry only. *Ibid.*

7. In such case, if the words "want of skill" meant incompetence they were surplusage; if they meant something different then they were not only immaterial but made the question double. *Ibid.*

Same: Simple tools.

8. A machinist's hammer is a simple tool, and no duty of inspection rests upon the master in respect thereto. *Meyer v. Ladewig*, 566

9. The rule that a master is not obliged to inspect a simple tool rests upon the assumption that the servant is in as good, if not better, position to observe any defects as the master. *Ibid.*

10. In an action against a master to recover for injuries received by a servant and caused by a splinter of steel flying from a hammer used by the servant, striking him in the eye and causing loss of sight, the court instructed the jury that ordinary care on the part of the master required reasonable inspection by him of the tools and appliances furnished by him to ascertain whether or not they were in a reasonably safe condition for use. *Held*, the hammer being a simple tool, that the instruction was erroneous. *Ibid.*

Same: Warning and instructing servant. See RAILROADS, 1, 9, 10.

Same: Contributory negligence: Assumption of risk.

11. In an action by a servant for injuries sustained from the collapse of a defective scaffold erected by the master, under the facts and circumstances, stated in the opinion, it was *held* that the servant was not guilty of contributory negligence, nor did he, as matter of law, assume the risk of the danger incident to the collapse of the structure. *Parker v. Fairbanks-Morse Mfg. Co.* 525

Same: Damages. See DAMAGES, 9, 10.

Liability for injuries to third persons. See FALSE IMPRISONMENT.

MAXIMS.
Stare decisis, 576.

MEASURE OF DAMAGES. See DAMAGES, 4–8. FRAUD, 6. SALES, 3, 4.

MECHANICS' LIENS.

See COSTS, 1, 2.

Enforcement: Action: Jury trial.

Under sec. 3328, R. S. 1878, as amended by ch. 30, Laws of 1897 (sec. 3323, Stats. 1898), the right to trial by jury on demand, and the effect of their verdict, were eliminated, and hence, in an action to enforce a mechanic's lien, the improper admission of evidence is not necessarily ground for reversal. *Spafford v. McNally,* 537

MEMORANDA. See GUARANTY, 2.

MERGER. See COMPROMISE AND SETTLEMENT, 8. REFORMATION OF INSTRUMENTS, 3.

MISREPRESENTATIONS. See INSURANCE, 2.

MISTAKE. See BANKRUPTCY, 7. COMPROMISE AND SETTLEMENT, 4–8. CORPORATIONS, 17. HIGHWAYS, 2. JUDGMENTS, 1. REFORMATION OF INSTRUMENTS, 1.

MONUMENTS. SEE BOUNDARIES, 1–3, 5, 6.

MORTGAGES. See BANKRUPTCY, 5.

MOTIONS.

See CERTIORARI, 4. JUDGMENTS, 3–8.

1. The addressing of a petition filed in a cause to the circuit judge instead of the court is at most a harmless irregularity that cannot mislead any one, where the showing in the petition was expressly to the court and the matter was treated as an application thereto. *Jackson Milling Co. v. Scott,* 267
2. In such case a prayer for a judgment, where strictly an order is the appropriate relief, is a harmless irregularity. *Ibid.*

MOTORMEN. See STREET RAILWAYS.

MUNICIPAL CORPORATIONS.

Charter provisions. See MUNICIPAL CORPORATIONS, 6, 7.

Governmental powers and functions. See NAVIGABLE WATERS, 1, 3.

Common council: Ordinances. See INTOXICATING LIQUORS.

Public improvements: Streets: Special assessments: Re-assessment. See PARTIES, 1.

1. Where a transaction involved in an action was the assessment of the benefits and damages as to plaintiff's property in respect to the improvement of a street and the validity of the determination as to the proportion of the cost thereof chargeable to plaintiff's land and the proportion payable otherwise, and the contractor defendant, to whom a special improvement certificate for the collection of the tax levied therefor was issued, by answer or cross-complaint claimed affirmative relief against his codefendant, the municipality, it is competent for the court to determine the ultimate rights of the two defendants in respect to the matter so far as such determination affected the transaction which was the subject matter of the action. *Dahlman v. Milwaukee,* 468

2. Sec. 1210*e*, Stats. 1898, as amended by ch. 354, Laws of 1903, plainly contemplates the existence of the right to invoke equity jurisdiction to prevent the sale of the land to collect an illegal tax, and regulates the remedy in connection with the re-assessment laws so as to do complete equity between the parties. *Ibid.*

3. Sec. 1210*e*, Stats. 1898, as amended by ch. 354, Laws of 1903, is supplementary to sec. 1210*d*, as amended. The procedure differs as to the manner of enforcing payment of the amount determined by the re-assessment proceedings to be chargeable against the property, but the right of the holder of an invalid street improvement certificate, upon a valid assessment of benefits and damages being made, showing the amount for which a certificate should have been issued, to recover the whole amount called for by such invalid certificate, part on account of the property involved and part out of the proper fund, is absolutely secured to the certificate holder by sec. 1210*d*. *Ibid.*

4. Under sec. 1210*e*, Stats. 1898, the court is not limited as to grantable relief to that specified in that section. *Ibid.*

5. Sec. 1210*e*, Stats. 1898, does not militate against the requirements of sec. 2610, as to the necessity of making the certificate holder a party defendant in a suit to set aside the certificate, nor sec. 2656*a*, as to settling the rights of codefendants between themselves and granting appropriate relief accordingly upon proper pleadings claiming the same. *Ibid.*

6. Charter provisions and a contract were *held* subject to the re-assessment laws, which in effect amended the city charter and are constitutional and effective. *Ibid.*

7. In such case the charter provisions and the re-assessment statutes supplementing the same secured to the contractor a right to receive of the city the difference between the contract price of the improvement in front of any parcel of land affected and the amount properly chargeable thereto, according to a valid ascertainment of the same, as provided in the charter, in case of the initial determination failing for want of a proper determination of benefits and damages. *Ibid.*

8. In such case the rights of the contractor and municipality result in this rule: In case of an invalid determination of the net benefits accruing to a parcel of land abutting on a street by reason of the improvement thereof, the cost of the improvement being payable to the contractor, to the extent of the net benefits to such property, by a special assessment certificate issued against the same and the balance of the municipality, and the work having been done and a proper certificate, in form, issued to the contractor, and the owner of the land commencing an action to set aside the certificate because of failure of the municipal authorities to properly ascertain the net benefits to the land,—the owner of the certificate should be made a party defendant, and the rights of the plaintiff as to both defendants and the rights of the latter as between themselves should be settled by a final judgment, and in case it is determined, in the manner provided by law, that the amount charged against plaintiff's property for the improvement is excessive, and the excess determined, judgment therefor should go against the municipality in favor of the contractor, if properly claimed in the latter's pleading. *Ibid.*

Use and regulation of public places: Streets: Dedication. See DEDICATION.

Police powers and regulations. See INJUNCTION. INTOXICATING LIQUORS.

Injuries from defective streets: Sewer trench.

9. An excavation, consisting of a sewer trench, in the traveled part of a highway is a defect unless guarded by sufficient barriers. *McGowan v. Watertown,* 555

10. In an action for injury received from driving into a sewer trench, the court submitted as one question of the special verdict the following: Was the street in a reasonably safe condition for public use? and this question, together with the next relating to notice and time to remedy defects, under the instructions is *held* to fully cover and include all the elements asked to be submitted by three requested questions, whether the trench was guarded by the use of proper lights or otherwise, so as to prevent danger; whether such lights or either of them had been removed or extinguished; and whether, if so, that was due to negligence of the defendant. The three requested questions were mere cross-examination of the jury. *Ibid.*

11. In such action the defendant is not prejudiced by the refusal of the court to join as defendants the persons who, under license from the city, dug the trench, and who, by virtue of the city ordinances and a bond, were required by the city to take certain specified precautions and to reimburse the city for any damages which might fall upon it by reason of their default therein. *Ibid.*

12. In such case the liability of such third parties was at best secondary, a liability on contract to the city, and their presence or absence in the action could have no effect upon the rights of the plaintiff or the liability of the city to him. *Ibid.*

MUTUALITY. See EVIDENCE, 2, 10–12. VENDOR AND PURCHASER, 1.

NAMES. See BANKRUPTCY, 6.

NATURAL MONUMENTS. See BOUNDARIES, 5, 6.

NAVIGABLE WATERS.

See INJUNCTION.

Rivers: Harbors: Obstructions.

1. A municipal corporation may maintain a suit in equity to prevent encroachment upon or obstruction of highways by land or water under its care and charge. *Milwaukee v. Gimbel Bros.* 31

2. The federal statutes regulating all harbors used in interstate commerce are merely restrictive of certain acts, and do not exclude states from prohibiting other acts within their borders as deemed necessary for public welfare and safety. *Ibid.*

3. The fact that the public authorities permit in a navigable river a structure in some degree interfering with navigation does not work a surrender of its authority to prevent other structures even on the same spot. *Ibid.*

NECESSARY PARTIES. See PARTIES, 1.

NE EXEAT.

1. The writ of *ne exeat* is not created, nor are its functions defined, by statute. *Davidor v. Rosenberg,* 22

2. Secs. 2784–2786, Stats. 1898, recognize the common-law writ of *ne exeat* and make certain provisions regulating practice, but do not pretend to enlarge its scope. *Ibid.*

3. At common law the writ of *ne exeat* was simply a writ to obtain equitable bail. It was issued by a court of equity on application of the complainant against the defendant when it appeared that there was a debt positively due, certain in amount or capable of being made certain, on an equitable demand not suable at law (except in cases of account and possibly some other cases of concurrent jurisdiction), and that the defendant was about to leave the jurisdiction, having conveyed away his property, or under other circumstances which would render any decree ineffectual. It was issued only against a debtor who was a party to the suit, not against a third person not a debtor whether he was a party to the suit or not. *Ibid.*

4. Under secs. 2784, 2785, Stats. 1898, "sufficient grounds" means grounds sufficient under the principles of the common law, and "any person" does not cover any one unless it appears that the party to whom the writ is directed is a debtor. *Ibid.*

5. Before answering, upon an affidavit alleging that plaintiff was indebted to him for money loaned; that the plaintiff had transferred all his property to one D. without consideration and in fraud of creditors, and that both plaintiff and D. intended to leave the state with such property and leave the defendant remediless, defendant procured a writ of *ne exeat* to be issued against plaintiff and D., who were arrested and gave bail. Thereafter the writ was vacated. *Held*, that the writ was rightly vacated (1) as to D., who was neither a debtor nor a party to the action; (2) as to plaintiff, since the writ was not granted at common law on the application of the defendant against the plaintiff. *Ibid.*

6. Sec. 2785, Stats. 1898, plainly recognizes and emphasizes the common-law principle that a writ of *ne exeat* is not granted on the application of the defendant, by providing that it shall only be granted on the affidavit of the *plaintiff* or some indifferent witness, and that the penalty of the bond or security to be given by the *defendant* shall be indorsed on the writ. *Ibid.*

[7. Whether a defendant, who has already interposed a counterclaim showing a certain debt due him from the plaintiff on an equitable demand, may be regarded as a plaintiff so as to be entitled to the writ of *ne exeat* upon a proper showing, not determined.] *Ibid.*

NEGLIGENCE.

Acts and omissions constituting negligence. See ANIMALS, 3–7. COMPROMISE AND SETTLEMENT, 7. EVIDENCE, 13. HIGHWAYS, 11–18. MASTER AND SERVANT. MUNICIPAL CORPORATIONS, 9–12. RAILROADS, 2–20. STREET RAILWAYS. TELEPHONES. TRIAL, 21, 22.

Same: Concurrent acts.

Where a defendant is charged with the consequence of two negligent acts, and the result is the natural and probable consequence of their concurrence, it is of no moment which of the two negligent acts was first and which was last in point of time. Under such circumstances the injury inflicted may be said to be the result of the concurrence of the two negligent

acts, and to be proximately caused by them. *Glettler v. Sheboygan Light, Power & R. Co.* 137

Proximate cause. See MASTER AND SERVANT, 5, 6. NEGLIGENCE. RAILROADS, 7, 8. STREET RAILWAYS, 5. TRIAL, 11, 19, 20.

Contributory negligence. See HIGHWAYS, 16–18. MASTER AND SERVANT, 11. RAILROADS, 6, 10, 11, 13. TELEPHONES. TRIAL, 14, 18.

Assumption of risk. See MASTER AND SERVANT, 11.

Actions: Preliminary proceedings. See LIMITATION OF ACTIONS, 1–6.

NEGOTIABLE INSTRUMENTS. See BILLS AND NOTES. CORPORATIONS, 11–14.

NEW TRIAL. See APPEAL, 12, 24–26. TRIAL, 32.

NONRESIDENTS. See CORPORATIONS, 23–27. DAMAGES, 2. INSURANCE, 6. LIMITATION OF ACTIONS, 6.

NONSUIT. See COSTS, 4. INSURANCE, 9.

NOTICE.
Of acceptance. See GUARANTY, 1.
Of defects. See SALES, 22.
Of injury. See LIMITATION OF ACTIONS, 1–6.
To produce documents. See TRIAL, 5.

NUISANCE. See NAVIGABLE WATERS.

OBSTRUCTIONS. See NAVIGABLE WATERS. WATERS AND WATERCOURSES.

OCCUPATION. See LIMITATION OF ACTIONS, 8–10.

OFFICERS.

Appointment, qualification, and tenure: Disqualification from holding an incompatible office.

1. The offices of county judge and justice of the peace are incompatible, and a county judge vacates his office by accepting the office of justice of the peace. *State v. Jones,* 572

Rights: Powers: Duties: Liabilities. See COMPROMISE AND SETTLEMENT, 2. CORPORATIONS, 8–22. LIMITATION OF ACTIONS, 13–15. TAX TITLES, 1.

Same: Delivery of books and papers to successor: Enforcement by statutory proceedings: Practice.

2. Under secs. 978, 979, 980, Stats. 1898, defendant M. petitioned the county judge of Waupaca county, alleging that V., the relator herein, had been removed from office, and that, M. having been duly appointed thereto, V. retained, and against M.'s demand refused to deliver, the books and papers in his custody. *Held:*

(1) The proceeding before the county judge was not a special proceeding in court, but one before a special tribunal not proceeding according to the course of the common law, nor as a court.

(2) The statutes providing no method of direct review either by appeal or otherwise, the action of the county judge was final, if he acted within and according to his jurisdiction.

(3) The acts of the county judge were subject to review on *certiorari* to the extent of ascertaining whether they were within the jurisdiction conferred.

(4) The circuit court had authority to issue its writ of *cer-*

tiorari to bring before it the record of the proceedings of the county judge for examination. *State ex rel. Velie v. Morgan*, 293

3. Under secs. 978, 979, 980, Stats. 1898, the jurisdiction conferred is confined to discharging the accused officer when he makes affidavit of having delivered over his books and papers to his successor, or, in the absence of such affidavit, if it shall appear that the books and papers are withheld, then to commit the recalcitrant officer to jail until he shall deliver them over. *Ibid.*

4. Under secs. 978, 979, 980, Stats. 1898, the magistrate before whom is brought an officer who has neglected or refused to turn over the books and papers of his office to his successor has no jurisdiction to impose a fine and enter an order that the recalcitrant officer shall be imprisoned and remain in custody until he pay such fine, in addition to turning over the books. *Ibid.*

5. Although an outgoing officer who neglects or refuses to turn over to his successor the books and papers of his office may be liable to the penalty denounced by sec. 977, Stats. 1898, such penalty is to be recovered in a court, and not before the special tribunal provided in secs. 978, 979, 980. *Ibid.*

OFFSET. See FRAUD, 4. SETOFF AND COUNTERCLAIM.

OPEN ACCOUNTS. See LIMITATION OF ACTIONS, 15, 16.

OPINION EVIDENCE. See EVIDENCE, 13–18. RAILROADS, 2–4.

OPTIONS. See VENDOR AND PURCHASER, 1–3.

ORDINANCES. See INTOXICATING LIQUORS, 3–5.

PAROL EVIDENCE. See BILLS AND NOTES, 3, 4. EJECTMENT, 1. EVIDENCE, 6–12. PARTNERSHIP, 3. SALES, 16, 17.

PARTIAL COSTS. See COSTS, 1, 2.

PARTIES.

See CERTIORARI, 1–3, 6. HIGHWAYS, 6 (2). INSURANCE, 2. JUDGMENTS, 4–6. MUNICIPAL CORPORATIONS, 5, 8, 11, 12. NE EXEAT, 3–5. SALES, 1.

1. Where the primary right claimed by plaintiff is that his property is not legally chargeable with a special improvement tax which, in form, was imposed thereon and a certificate issued therefor and delivered to the contractor, the principal defendant necessarily is the municipality, it being the actor in imposing the tax and enforcing the same, to the plaintiff's injury by a sale of his property, and the contractor, as the owner of the tax claim, is a proper if not a necessary party defendant. *Dahlman v. Milwaukee*, 468

2. In such case, if the contractor had not been joined in the first instance, it would be the duty of the court to order him brought in under the mandatory rule of sec. 2610, Stats. 1898, and it would have been improper for the court to proceed to final judgment declaring the improvement certificate void without ordering him brought in, and the order bringing him in obeyed, whether either of the parties moved the court to that end or not. *Ibid.*

3. The scope of the court's power, when a person is properly or necessarily joined with the main defendant in a suit in equity, is covered by secs. 2656*a*, 2883, Stats. 1898. *Ibid.*

PARTNERSHIP.

Partnership real estate. See PLEADING, 6. TRUSTS AND TRUSTEES, 4.

1. On appeal from an order overruling a demurrer to a complaint in an action to charge defendants as trustees holding the legal title to certain real estate for the plaintiff partnership, *held:*
   (1) The real estate in question was property belonging to the partnership up to the time of its dissolution.
   (2) Although the complaint did not in express terms allege an agreement to convey to plaintiffs such legal title, such agreement was necessarily implied from allegations that plaintiffs purchased the real estate and paid in full the agreed purchase price.
   (3) Refusal of one defendant to convey the legal title to the lands to plaintiffs and his conveyance to his codefendant was a breach of a trust and a fraud on the plaintiffs. *Kyle v. Carpenter,* 310
2. Real estate purchased for partnership purposes and appropriated to those purposes and necessary therefor, always becomes partnership property, and it is immaterial in what manner, or by what agency, the land is bought, or in what name it stands. The partner holding the legal title to land, however it may have come to him, will be held as trustee for the partnership, if it be certain that the land was in fact a part of their joint property as partners. *Ibid.*
3. Where a partnership holds land not as the chief purpose of its existence, but as an incident to its business, the statute of frauds does not apply, and the land may be shown to be part of the partnership stock and affected with partnership equities by oral evidence. *Ibid.*
4. Real estate so purchased and held is in equity not only considered as the property of the firm for the payment of its debts, but also for the purpose of adjusting the equitable claims of the copartners between themselves. *Ibid.*

PATENTS.

Conveyances and contracts.

1. It is competent for the owner of a patent to sell an exclusive right to vend the device in a given county and take a note therefor. *Twentieth Century Co. v. Quilling,* 318
2. Such note is valid and enforceable in full (in the absence of fraud) notwithstanding the fact that the value of the right sold is greatly overestimated. *Ibid.*
3. Where the owner of a patent sells an exclusive right to vend the device in a given county it is competent to agree that, in case the vendee induces others to purchase county rights of sale, the vendee shall receive as his compensation a specified part of the purchase price of such rights so purchased. *Ibid.*
4. Plaintiff, a patentee, and defendant entered into a written contract giving defendant a county right to sell the patented article, which also contained an agreement that, if defendant should induce others to purchase county rights, he should receive a specified proportion of the sums realized from such sales. In an action on defendant's note given in part payment on such contract, the trial court refused to allow an amendment

to the answer on the ground that it stated no defense, and also rejected offers of proof of facts tending to support the proposed amendment. *Held:*

(1) The proposed amendment stated a defense and should have been allowed.

(2) The enterprise disclosed by the proposed amendment was contrary to public policy and void.

(3) It was not sufficient that the device was of some utility and value, in the face of allegations that the right to sell it was of merely nominal commercial value on account of the great number of equally useful devices of the same nature, and was not considered in the transaction except as a means of giving an appearance of validity and honesty. *Ibid.*

Same: Consideration.

5. A valid patent on a useful article is a sufficient consideration for a note, though the patent may never be profitable. *Twentieth Century Co. v. Quilling,* 318

PAUPERS.

1. Although one who is capable of earning a living and has some money may not be a pauper in fact, such facts are not conclusive against the possibility of having been supported as a pauper. *Sheboygan County v. Sheboygan Falls,* 93

2. Under the expression "supported as a pauper," it is not only essential that aid should have been given by the poor authorities, but that such aid should have been applied to or received by the supposed pauper. *Ibid.*

3. After a town had furnished support for B., a transient pauper, and had been reimbursed by the county, in an action by the county against the town in which B. had her legal residence the only question submitted to the jury was whether the town officers paid the money with the intention of aiding or supporting B. as a poor person. *Held,* that such question exhausted the issues only in case the evidence was undisputed that B. did receive the aid or some part thereof. *Ibid.*

4. One, though living in the family and eating at the table of a pauper aided by the poor authorities, who pays his board, cannot be said to receive aid as a pauper merely because the landlord uses the money furnished by the poor authorities to purchase the food which the boarder eats. *Ibid.*

5. In such case it makes no difference that the board is paid in services instead of money. *Ibid.*

6. As a means of extending aid and support the poor authorities paid certain moneys to L. under an agreement that C. should take charge of the housework and care of L.'s children, thereby permitting L. to work out and earn the balance of the support needed for her family, which was done, and, in addition, C. paid certain moneys to L. for the purchase of necessaries for L.'s family. *Held,* that it could not be said, as a matter of law, that C. received as a pauper, and not merely as return for her own services and money, any portion of the aid furnished by the poor authorities, but that the question should have been submitted to the jury for their answer in the light of all the facts, circumstances, and reasonable inferences to be drawn therefrom. *Ibid.*

PAYMENT.

See ACCORD AND SATISFACTION. BILLS AND NOTES, 6, 10, 11.

1. A controversy having arisen as to the exact amount due plaintiff on a sale, plaintiff refused to accept the sum which was offered him as payment in full for the property purchased. Thereafter plaintiff drew on defendants through a bank for the amount he claimed, with instruction to the banking officers to receive no amount in payment of such draft other than the sum specified therein. Defendants appeared and left with the bank the sum previously offered, which was received and retained by the bank and offered to plaintiff, who refused to accept it as payment for his claim, and brought suit for the full amount claimed. *Held:*
   (1) Defendants' deposit did not constitute payment of plaintiff's claim *pro tanto.*
   (2) Plaintiff was entitled to recover in the action the full amount of his claim and interest, with costs. *Curkeet v. Steinhoff,* 146
2. From the authority given a bank by receiving a draft for collection there arises no implication of authority other than to obtain payment in full. Any implied authority to accept part payment is excluded. *Ibid.*

PERSONAL INJURIES. See ANIMALS, 1, 3–7. EVIDENCE, 13. HIGHWAYS, 11–18. LIMITATION OF ACTIONS, 1–6. MASTER AND SERVANT. MUNICIPAL CORPORATIONS, 9–12. PLEADING, 4, 5. RAILROADS, 2–20. STREET RAILWAYS.

PHARMACY. See CONSTITUTIONAL LAW, 2–5. EVIDENCE, 1, 2.

PHYSICIANS AND SURGEONS. See RAILROADS, 2–4.

PLATS. See BOUNDARIES, 4, 6.

PLEADING.

Allegations in general.

1. In pleading fraud the facts in respect to the matter should be stated. *Steinberg v. Saltzman,* 419
2. In pleading a matter relating to the existence or nonexistence of a public record the truth of which is readily ascertainable, allegations in respect thereto on information and belief are not sufficient. *Ibid.*
3. When a person more than twelve years after arriving at his majority invokes equity jurisdiction for relief from acts which occurred more than twenty-five years prior thereto, his pleading should state some reasonable excuse for the delay. *Ibid.*

Complaint. See CERTIORARI, 3. DAMAGES, 2. DEDICATION, 2. EJECTMENT, 2, 3. EXECUTORS AND ADMINISTRATORS, 9–11, 13. INJUNCTION, 2. INTOXICATING LIQUORS, 5, 6. LIMITATION OF ACTIONS, 5. PARTNERSHIP, 1.

4. In an action by a servant for injuries from the defective operation of machinery it is not necessary that the servant, at his peril, ascertain the initial cause of the defective operation and set it forth in his pleading. It is sufficient, as against demurrer or objection upon the trial, if he describe the machine and its operation and allege the ultimate fact that the machine was defective in that it was not at the time subject to control by

the means employed as it should have been, and that thereby it became uncontrollable, and that the accident resulted from such want of control, although the pleading may be subject to a motion to make it more definite and certain. *Odegard v. North Wis. L. Co.* 659

5. In an action by a servant for injuries from the defective operation of machinery the plaintiff alleged one specific fact which he claimed was a cause of the uncontrollability, but he also alleged that there were other defects unknown to him. *Held*, that such allegations were sufficient to entitle plaintiff to introduce evidence of defective construction in any respect which was shown to be effective to produce the uncontrollable condition. *Ibid.*

Answer. See COMPROMISE AND SETTLEMENT, 1-3.

Counterclaim. See NE EXEAT, 7. SALES, 11, 12. SETOFF AND COUNTERCLAIM, 1, 2.

Cross-complaint. See MUNICIPAL CORPORATIONS, 1.

Demurrer. See APPEAL, 2. DAMAGES, 2. EJECTMENT, 2. LIMITATION OF ACTIONS, 7. PARTNERSHIP, 1.

6. In an action to charge defendants as trustees holding the legal title to certain real estate for the plaintiff partnership, under the complaint, stated in the opinion, it was *held* that a demurrer was properly overruled. *Kyle v. Carpenter,* 310

Amendment. See EXECUTORS AND ADMINISTRATORS, 14, 15. INTOXICATING LIQUORS, 6. PATENTS, 4. REFORMATION OF INSTRUMENTS, 2.

7. It is not error to refuse to allow a complaint to be amended by adding thereto a new cause of action arising *pendente lite. Pape v. Carlton,* 123

8. So long as a cause is under the control of the trial court the power of amendment is within the broad limits of judicial discretion, subject, however, to the general limitations that the form of the action must not be changed from equity to law or from contract to tort, and also that the amendment must not contain an independent cause of action accruing pending the suit, must be in furtherance of justice, and must be allowed in such manner as not, in a legal sense, to prejudice the rights of the adverse party. *Longwell v. Mierow,* 208

Issues, proof, and variance. See ROBBERY, 2, 4.

9. If a material allegation of the complaint is not established in the exact detail of the charge but is as to the substance thereof the variance is not material. *Hodge v. Smith,* 326

POLICE POWER. See ANIMALS, 7. CONSTITUTIONAL LAW. INJUNCTIONS.

POOR PERSONS. See COSTS, 6-8. PAUPERS.

POPULATION. See CONSTITUTIONAL LAW, 1-4.

POSSESSION. See LIMITATION OF ACTIONS, 7-10. QUIETING TITLE, 2. VENDOR AND PURCHASER.

POVERTY. See COSTS, 6-8. PAUPERS.

PREJUDICE. See VENUE.

PRESUMPTIONS. See ASSAULT, 3, 4. BILLS AND NOTES, 8. COSTS, 4, 5. DEEDS. EVIDENCE, 5, 16. HIGHWAYS, 4. 6 (4). INSURANCE, 12. LIMITATION OF ACTIONS, 3, 9, 10.

PRIMA FACIE EVIDENCE. See ASSAULT, 3, 4. BILLS AND NOTES, 8, 9. INSURANCE, 9.

PRINCIPAL AND AGENT. See FALSE IMPRISONMENT. HUSBAND AND WIFE. INSURANCE, 4, 5. PAYMENT, 2. SALES, 17, 18. TRUSTS AND TRUSTEES, 1. WITNESSES, 2, 3.

PRINCIPAL AND SURETY. See APPEAL, 27. GUARANTY.

PRIVITY. See LIMITATION OF ACTIONS, 8.

PROBABLE CAUSE. See MALICIOUS PROSECUTION, 1, 2.

PROCESS.

Substituted service: Appearance: Waiver.

1. In an action planted in equity, demanding cancellation of notes upon the ground of fraud, there was substituted service, but the defendants appeared in the action and answered generally, denying the fraud and insisting upon the validity of the notes. With such answer defendants appeared at the trial and litigated all the issues thus raised. *Held*, that the court was thereby given jurisdiction of the defendants personally, and was empowered to render whatever personal judgment was warranted by the facts and circumstances adduced within the litigated issues of the cause. *Luetzke v. Roberts.* 97
2. The effect of such appearance was to waive the want of personal jurisdiction under substituted service, and operated to confer jurisdiction as to defendants, and thus to change the character of the proceeding from one *in rem* to one *in personam.* *Ibid.*

PROMISSORY NOTES. See BILLS AND NOTES. CORPORATIONS, 11–14.

PROMOTERS. See FRAUD, 2, 3.

PROOFS OF LOSS. See INSURANCE, 8–10, 12.

PROPER PARTY. See PARTIES, 1.

PROVISIONAL REMEDY. See DISCOVERY, 1, 2.

PROXIMATE CAUSE. See MASTER AND SERVANT, 5, 6. NEGLIGENCE. RAILROADS, 7, 8. STREET RAILWAYS, 5. TRIAL, 11, 19, 20.

PUBLIC IMPROVEMENTS. See MUNICIPAL CORPORATIONS, 1–8. PARTIES, 1.

PUBLIC INTERESTS. See HIGHWAYS, 4.

PUBLIC POLICY. See CONSTITUTIONAL LAW, 2. CORPORATIONS, 20. EVIDENCE, 9. PATENTS, 4.

PUBLIC RECORD. See PLEADING, 2.

QUASHING. See CERTIORARI, 4.

QUIA TIMET. See QUIETING TITLE, 2.

QUIETING TITLE.

See EQUITY, 1. TAX TITLES, 2.

1. One who has sold and warranted the title to realty may maintain judicial proceedings to remove a cloud on such title or to prevent a cloud thereon. *Jackson Milling Co. v. Scott,* 267
2. Where a court of equity grants relief upon the principle of *quia timet*, thus preventing any vexatious or wrongful use of agree-

ments which are in fact conditions subsequent, and removing them as a cloud upon the title, it is immaterial whether or not the plaintiff is in possession of the premises. *Mash v. Bloom*, 366

RAILROADS.

See STREET RAILWAYS.

Operation: Signals. See RAILROADS, 9.

1. In the absence of statutory regulation, employees of a railroad company are not required to signal by whistle or otherwise merely because the train is rounding a curve. *Vaundry v. Chicago & N. W. R. Co.* 233

Injuries to passengers.

2. On an issue as to whether an illness suffered by plaintiff had been aggravated by his being carried by his station on defendant's train (he thereafter having become permanently paralyzed), it is not error to take the opinion of physicians as to plaintiff's condition and to state the progress of his illness to the time he was carried by his station, without including his condition from that time to the time he became permanently paralyzed, where the opinion asked for was based on a series of facts understood and relied upon as descriptive and symptomatic of brain lesion and cerebral hemorrhage, and said to be known and relied upon in medical science. *Nelson v. Chicago & N. W. R. Co.* 214
3. In such case testimony of the physicians that the facts proven showed a stoppage of the hemorrhage causing the paralysis on the day plaintiff was carried by his station and a renewal thereafter, under the evidence, stated in the opinion, is *held* not to be wholly incredible or conjectural and is within the field of opinion evidence. *Ibid.*
4. In such case testimony of the physicians as to plaintiff's condition after he had been carried by his station and up to the time his attending physician saw him is *held* competent. *Ibid.*
5. In such case a verdict in favor of plaintiff is *held* to be supported by evidence tending to show that plaintiff was injured by defendant's negligence in carrying plaintiff by his station. *Ibid.*
6. Where a passenger, unknown to himself, was in fact suffering from a brain lesion accompanied by cerebral hemorrhage when he was carried by his railroad station, failure to seek medical advice and assistance at the place he left the train and walking around while waiting for the train which took him home do not show contributory negligence as matter of law, and that question was properly submitted to the jury. *Ibid.*
7. In an action against a railroad company by a passenger suffering from incipient paralysis who was carried by his station and thereby the disease was so aggravated that complete paralysis ensued, the court submitted without comment or explanation a question of the special verdict inquiring whether the aggravation of plaintiff's condition was the natural and probable result of defendant's negligence, and then proceeded to read a question inquiring whether defendant ought to have anticipated some injury from its acts. Thereupon the court instructed the jury as stated in the opinion. *Held*, that thereby the court con-

fused the ideas of proximate cause embodied in the questions of the special verdict, and failed to observe the distinction between the two elements as there set out. *Ibid.*

8. In such case the error is *held* not prejudicial, since under the facts found by the jury reasonable anticipation of injury was the only element necessary to establish liability, and under the evidence, stated in the opinion, the court should have held, as matter of law, that the fact of anticipation was established. *Ibid.*

Injuries to employees: Sectionmen.

9. Under the evidence, stated in the opinion, a railroad sectionman, sent to place a flag to warn trains to slow down as they approached the place where other sectionmen were working, is *held* to have assumed the risk of his own safety from an extra train running over the tracks without notice or warning except such as resulted incidentally from the ordinary noises of the train, including such bell and whistle signals as were customary. *Vaundry v. Chicago & N. W. R. Co.* 233

10. Where a railroad sectionman, in the discharge of his duty, was killed while moving toward an approaching train of which there was an unobstructed view for 600 or 800 feet ahead of him, the deceased was *held* guilty of contributory negligence precluding recovery, even if there was negligence on the part of the railroad company. *Ibid.*

11. In an action for personal injuries to a sectionman while engaged in lifting a handcar from the track, questions as to the credibility of plaintiff's testimony as to the conduct of the foreman in lifting the handcar so as to precipitate the whole weight thereof upon the plaintiff, as to whether the action of the foreman was that customarily adopted, and as to whether plaintiff was guilty of contributory negligence, are *held* to be governed by the well-established rule that, under circumstances of mere conflict of credible testimony of witnesses, the supreme court should not and will not overrule the conclusions of the jury and the trial court. *Hardt v. Chicago, M. & St. P. R. Co.* 512

12. In such case the method of removing the handcar described by the plaintiff, and stated in the opinion, is *held* to present no question of physical impossibility. *Ibid.*

13. In such case, on the evidence, stated in the opinion, it is *held* that it could not be said as matter of law that plaintiff, standing in front of the handcar, as he did, to control the front end of it, was guilty of negligence where he had no reason to anticipate the result causing his injury, nor that he assumed the risk. *Ibid.*

14. Plaintiff, who was injured while engaged in lifting a handcar from the track, the foreman lifting the rear of the car and precipitating it down and upon plaintiff, testified that, but for slipperiness, he and his companion could probably have held the car notwithstanding the conduct of the foreman. *Held*, that such testimony presented a case of an existing condition, in the face of which acts of carelessness were likely to be injurious, and that those acts should be held to be the legal cause rather than the slippery condition of the ground, which constituted merely one of the surrounding circumstances and conditions. *Ibid.*

Same: Hazards peculiar to the operation of railroads.

15. The phrase added to sec. 1816, Stats. 1898, by ch. 448, Laws of 1903, "provided that such injury shall arise from a risk or hazard peculiar to the operation of railroads," is hardly accurate, since injuries do not arise from hazards or risks, but from acts or events. *Hardt v. Chicago, M. & St. P. R. Co.* 512

16. The idea intended would seem to be more clearly expressed by describing the injury or the event causing it as *within* such peculiar risk or hazard. *Ibid.*

17. The transportation of men and materials over its tracks is part of the "operation of railroads," and none the less so because the vehicle is a handcar. *Ibid.*

18. Plaintiff, while engaged with another sectionman and the section foreman in removing a handcar from the track, received an injury caused by the section foreman raising the rear end of the car, thereby causing it to be precipitated upon and over the plaintiff down a steep embankment. *Held* that, while the ultimate purpose of plaintiff and his fellows was to repair the roadbed, they were, at the moment of the injury, engaged in the transportation of themselves, their handcar, tools, and materials from a station on the railway to the place of their proposed labor, and the fact that they had reached the end of their trip and were engaged in the act of alighting did not preclude the view that they were still in the course of such transportation, which could not be considered terminated until their destination was completely reached. *Ibid.*

19. In such case the risk of injury attending the hurried removal of the handcar at an inconvenient and dangerous place is *held* to be peculiar to railroad business. *Ibid.*

20. In such case the trial court was right in refusing to rule that plaintiff was outside the protection afforded employees of railroads by sec. 1816, Stats. 1898, as amended by ch. 448, Laws of 1903. *Ibid.*

RATIFICATION. See CORPORATIONS, 9. INSURANCE, 4, 5. HUSBAND AND WIFE, 3, 5.

REAL PROPERTY. See BANKRUPTCY, 1–5. BOUNDARIES. EJECTMENT. EQUITY. JOINT TENANCY. GIFTS. HUSBAND AND WIFE. INSURANCE, 2–7. PARTNERSHIP. QUIETING TITLE. REFORMATION OF INSTRUMENTS. RELIGIOUS SOCIETIES, 2–5, 7–11. TRUSTS AND TRUSTEES, 4. VENDOR AND PURCHASER.

RE-ASSESSMENT. See MUNICIPAL CORPORATIONS, 2–7.

RECITALS. See APPEAL, 5. EVIDENCE, 6, 7. VENDOR AND PURCHASER, 2. WILLS, 3.

RECORDS. See PLEADING, 2.

RE-ENTRY. See EQUITY, 4.

REFERENCE. See APPEAL, 1.

REFORMATION OF INSTRUMENTS.

1. In an action to reform a deed the evidence, stated in the opinion, is *held* to justify a finding that a mutual mistake was made as to the identity of the tract of land described in the deed, and that the deed should be reformed so as to include that pointed out and supposed to be conveyed. *Scheuer v. Chloupek,* 72

2. In an action to reform a deed the fact that the land was a homestead occupied by the grantor and his wife was not pleaded. On the trial testimony tending to show such fact was received subject to objection as to its competency, relevancy, and admissibility under the pleadings. No application to amend the answer was made until after the evidence had been closed and the facts argued, and was first requested nearly three months thereafter in defendant's brief. *Held*, under the circumstances shown in the record, that there was no abuse of discretion in refusing leave to amend. *Ibid.*

3. In an action against the grantor and his wife to reform a deed the grantor died pending an appeal. After judgment and prior to his death the grantor conveyed all his title and interest in the land affected to his wife. It was contended, on appeal, that the wife had only signed the deed in that capacity, that she had received no consideration therefor, and that the law would not reform the deed so as to bar her dower in land which she had never conveyed nor agreed to convey, and for which she had received no part of the consideration. *Held* insufficient, since the record showed (1) there was neither pleading nor proof that the wife had received no part of the consideration; (2) that by accepting the deed of the fee the wife's inchoate estate in dower was merged in the fee. *Ibid.*

RELIGIOUS SOCIETIES.

1. Neither seceding members, though a majority, nor any majority of a religious society, no matter how fully invested with all corporate powers, have a right to divert its property from the uses defined and limited by the grant of such property to it or the purposes of its organization as regards the particular religious faith it was organized to promote. *Cape v. Plymouth Congregational Church*, 174

2. A religious society holding property charged with a trust for certain purposes cannot, even by due corporate action, divert it to other and inconsistent uses; and when such use is for the promotion of the doctrine and discipline of some particular denomination, courts will prevent diversion to the support of a different and inconsistent one, if even a single individual legally interested objects. *Ibid.*

3. Where a deed of lands gave to trustees the right to appoint, not an individual corporation or society, but some religious denomination, to exercise ecclesiastical control over the premises, viz., the occupation for religious services on Sundays and Wednesday evenings, an appointment of a designated religious denomination necessarily implies a limitation of such use to the doctrines and purposes of that denomination. *Ibid.*

4. Under a deed to trustees authorizing the appointment of some religious society to exercise ecclesiastical possession over church premises, the trustees made appointment to the Primitive Methodist Society, which was a subordinate member of, and subject to the discipline and regulations of, a conference, a synodical religious organization. *Held*, that the use of the property in question was restricted to a society subject to the discipline and supporting the doctrine of the Primitive Methodist denomination. *Ibid.*

5. In such case, where the Primitive Methodist Society repudiated submission to the synodical head of the Primitive Methodist Church, and set itself up as the supreme authority over its own affairs and over its members in matters religious and secular, such action is *held* to be a departure from the use and purpose for which the possession of the property in question was originally conferred on the society and the use to which the property was limited. *Ibid.*

6. To constitute one a member of a church, or an individual society a member of a general synodical organization, at least two things are essential: a profession of the accepted faith and a submission to its government. *Ibid.*

7. In view of the remoteness of the transactions, stated in the opinion, and the absence of any prescribed form by which trustees were to make appointment, a showing of long occupation, reputation, and apparent approval were sufficient, and, in the absence of anything in conflict, established a legal and proper appointment. *Ibid.*

8. A resolution of the general conference of the Primitive Methodist Church, stated in the opinion, is *held* not to have become a part of the discipline of the church, or open to construction as a consent, approval, or authorization of any withdrawal whatever from the general conference. *Ibid.*

9. Under a deed to trustees with power to appoint some religious denomination to exercise the ecclesiastical possession over the granted premises and with power to make another appointment should the appointee "withdraw its services," a second appointment vests in the appointee the right to the possession and use of the premises until it in turn withdraws its services. *Ibid.*

10. Where a religious society was entitled to the use of certain church property until it withdrew its services, and, having been supplanted by another society, was strenuous in its efforts to regain possession for the purpose of conducting its services, failure to maintain religious services in the church is *held* not to be a withdrawal of such services. *Ibid.*

11. Where a religious society, only entitled to a limited use and possession of a church edifice, recovers judgment establishing its right to possession, the judgment should only establish its right to such limited possession and use. *Ibid.*

REMAINDERS.

1. Under ch. 300, Laws of 1899, authorizing a sale of future contingent interests in land in all cases wherein the court may find a sale to be substantially promotive of the interests of the parties, it was not intended to confer upon courts powers additional to those theretofore exercised for the sale of interests in lands, but to prescribe a procedure to effect such sales; and hence interests in remainder belonging to the children of a devisee for life, or, should he die without issue, to testator's children or their issue, cannot be ordered sold in such a way as will result in a complete separation of such remainder from the life estate. *In re Kingston's Estate,* 560

2. In such case, if some disposition of an interest in the estate must be made for the purpose of obtaining funds to discharge liens and claims created against it by the testator, and for its preser-

vation, it is proper to raise the necessary sums by mortgage or by a sale of part or all of the estate, and to appropriate so much of the proceeds as may be required to free it from such liens or claims to that purpose, the remainder to be kept in lieu of the real estate and held for the use and benefit of the parties as intended by the testator in his devise of the real estate. *Ibid.*

REPRESENTATIONS. See INSURANCE, 2.

RES ADJUDICATA. See APPEAL, 23.

RESCISSION. See CORPORATIONS, 10. SALES, 2-7, 11-13, 20-22. TRIAL, 3, 4, 21.

RESULTING TRUSTS. See TRUSTS AND TRUSTEES, 4.

RETURN. See SALES, 2, 6, 14.

REVOCATION of license. See INTOXICATING LIQUORS, 1, 2, 5, 6.

REVOLVER. See ASSAULT, 1-3. ROBBERY, 2, 6.

RIVERS. See INJUNCTION. NAVIGABLE WATERS.

ROAD MACHINES. See HIGHWAYS, 8, 10.

ROBBERY.

See INSURANCE, 16.

1. In a criminal prosecution for an assault with intent to rob, the evidence, stated in the opinion, is *held* to sustain a verdict of guilty. *Lipscomb v. State,* 238
2. The elements of the crime at which sec. 4375, Stats. 1898, is directed are: (1) assault; (2) actual robbery; (3) being armed with a dangerous weapon; and (4) intent, if resisted, to kill or maim, or, in lieu of this intent, actual wounding or striking. Hence an information charging that the defendant feloniously assaulted the complaining witness and put him in fear and actually robbed him, specifying an amount, the defendant being armed with a dangerous weapon, to wit, a revolver, wholly omits the fourth element and does not charge the crime defined by that section. *Ibid.*
3. Such information does, however, charge the crime defined by sec. 4376, Stats. 1898. *Ibid.*
4. Although such information charged actual robbery instead of intent and was followed by a verdict of guilty, there is no prejudicial variance between the statute, the information, and the verdict, since, while the information charged more than the statute required, it in legal effect charged also all that the statute and verdict covered. *Ibid.*
5. In a criminal prosecution for assault with intent to rob being armed with a dangerous weapon, the court stated in its charge that no one had given any testimony upon the question whether the defendant was armed at a specified time and place. *Held,* that testimony of the defendant that he had no revolver on the night in question did not render such statement erroneous, since the jury must have understood the charge as referring to absence of specific testimony, and not that defendant's testimony was untrue or not to be considered. *Ibid.*
6. In a criminal prosecution for an assault with intent to rob being armed with a dangerous weapon, there was no direct proof that

the revolver was loaded, and instructions to the jury, stated in the opinion, are *held* erroneous in omitting any proper instruction as to what constituted a dangerous weapon, and in stating that if the revolver, as used, was the means by which the complaining witness was compelled to submit to the robbery, it was thereby shown to be a dangerous weapon. *Ibid.*

RULES OF COURT.

See APPEAL, 7. TRIAL, 9.

A rule of court in order to be valid must be reasonable. *Odegard v. North Wis. L. Co.* 659

Circuit Court Rule XI, sec. 1 (Motions), 437.
Circuit Court Rule XXII, sec. 3 (Argument), 187.
Supreme Court Rule 46 (Service of briefs), 638.

SALARIES. See CORPORATIONS, 8–10, 20, 21.

SALES.

Requisites and validity in general. See CORPORATIONS, 15–19. PATENTS.

Same: Parties in interest.

1. In an action to recover the price of an engine upon a rescission because of breach of warranty it appeared, among other things, that plaintiff and B., as surety, signed a written order upon defendant for the engine; that such order directed defendant to furnish the engine to the signers of the order in care of W. & T., agents at M.; that such order contained the terms of sale and warranty, and that the order was accepted by defendant and the engine delivered through W. & T. *Held:*
(1) When the order was accepted the contract between plaintiff and defendant was closed.
(2) The contract was with defendant and not with W. & T.
(3) Plaintiff was the real party in interest. *Kohl v. Bradley, Clark & Co.* 301

Rescission by seller: Failure to return: Damages.

2. A buyer, having received goods ordered accompanied by an invoice, objected to the price and sent his check to the seller for the amount he claimed to be a fair price. The seller immediately replied insisting on the price named in the invoice, but gave the buyer the option to keep the goods at the demanded price or to redeliver the goods to the seller at once. The buyer thereupon requested the return of his check, which was returned, but failed to redeliver the goods. *Held:*
(1) The return of the check was a sufficient consideration for the promise of the buyer to redeliver the goods.
(2) The inconsistent conduct of the buyer in retaining and using the goods gave the seller the right to elect to hold the buyer on an implied contract to pay the demanded price, or to stand on the contract to return the goods and to recover its damages instead of the demanded price. *American Foundry and Furnace Co. v. Settergren,* 338
3. In such case, the seller having elected to stand on the contract to return the goods, its damages, in the absence of peculiar circumstances, were the market value of the goods. *Ibid.*

4. In such case the election of the seller opens the door to the buyer to offer proof in negation of the damages claimed, and, there being conflict of evidence upon that subject, it was *held* that the verdict of the jury could not be set aside on appeal. *Ibid.*

Rescission by buyer. See SALES, 11-13, 20, 22. TRIAL, 21.

5. In an action to recover the price of an engine it appeared, among other things, that plaintiff had refused to accept the engine and rescinded the contract as soon as he discovered that the engine was not in compliance with the warranty under which it had been sold. *Held*, that plaintiff was within his rights, and that defendant could not avoid the rescission on the ground that the contract was executed. *Kohl v. Bradley, Clark & Co.* 301

6. In an action to recover the price of an engine upon a rescission because of a breach of warranty, it appeared, among other things, that the plaintiff returned the engine to defendant's agents through whom the sale had been made. The defense as to the sufficiency of the return was not based upon the failure to return to the proper place, but the right to return at all. *Held*, under the evidence, stated in the opinion, that the return to the agents was sufficient. *Ibid.*

7. In such case there could be no waiver of the breach of warranty predicated on failure to render friendly assistance and co-operation and opportunity for a test, where, at the time the test was proffered, the sale had already been rescinded and the engine returned, and the jury found that the test had not been seasonably proffered. *Ibid.*

Performance of contract: Defects: Waiver. See DAMAGES, 4, 5.

8. Where articles required by contract to be of a particular character are shipped to the executory vendee as the proper kind and received by the latter without notice being given to the vendor, within a reasonable time thereafter, that the articles will not be accepted as satisfying the contract, all defects discoverable by reasonable attention to the matter are waived. *Forster, Waterbury Co. v. F. MacKinnon Mfg. Co.* 281

9. Where the manufacturer and seller of iron castings was to deliver in instalments, and after two shipments the buyer made complaint of defects, and in order to remedy such defects the patterns were changed and improved, and thereafter shipments were regularly made during an interval of about six months without definite notice of defects until after all shipments were substantially completed, the court is warranted in holding as matter of law that such defects, as to the castings made after the patterns were improved, were waived. *Ibid.*

10. In such case, under the evidence, stated in the opinion, the alleged defects are *held* not to be so serious as to render the castings not good and suitable within the calls of the contract under which they were furnished. *Ibid.*

Warranty: Breach. See TRIAL, 3, 4, 21.

11. In an action for the price of a traction engine defendant counterclaimed, alleging breaches of warranty. It appeared from the contract set out in a counterclaim that, if the defendant failed to settle for the engine as provided in the contract, the warranty became void. *Held*, that an allegation of the counterclaim that defendant never refused to make settlement for the

engine was a verity on an appeal from an order overruling a demurrer to the counterclaim, and rendered unnecessary consideration of the question whether defendant was bound to make settlement if demanded. *Lindsay v. Fricke,* 107

12. In an action for the price of a traction engine an allegation of a counterclaim that there was a breach of a special warranty entitling the defendant to damages is not inconsistent with contract provisions to the effect that *all* warranties should be void if the engine was not settled for, where the counterclaim avers that the defendant never refused to make settlement. *Ibid.*

13. A contract for the sale of a traction engine contained a special warranty as to its capacity, and also a general warranty respecting material and construction which made no mention of capacity, and was followed by provisions that notice of the failure of the engine to fill "*this*" warranty should be given the seller, and that continued possession by the buyer for ten days should be conclusive evidence of the fulfilment of the warranty. *Held,* that the provisions as to notice and the effect of retaining the engine had no reference to the special warranty. *Ibid.*

14. In an action for the price of a stallion transferred by a formal bill of sale containing a special warranty and a stipulation that, on failure of the warranty, plaintiffs would furnish another stallion of *equal quality* in exchange upon the return of the stallion in question, there was interposed an answer alleging breach of warranty and of fraud in the sale, but there was neither pleading nor proof that the stallion had ever been returned or that defendants had ever offered to return it. *Held,* that the trial court rightly ruled that the question of fraud was not in the case. *Dunham v. Salmon,* 164

15. In such case no breach of the written warranty was shown, since it only bound the plaintiffs to furnish another stallion upon condition of the return of the one sold. *Ibid.*

16. In an action on a joint and several note given by numerous defendants for the purchase price of a stallion, there was pleaded a breach of warranty. There was evidence of a special written warranty which had not been breached because of failure of defendants to comply with its conditions, and there was also an attempt to prove an oral warranty by the plaintiffs' agent. The jury found the making of such oral warranty and its breach. *Held,* that the jury's findings were not justified in the absence of proof that the oral warranty was made to each one of the defendants. *Ibid.*

17. In such case, even though the evidence tended to show that the agent made such oral warranty to each and all of the defendants, the defendants could not succeed without showing that the agent had express authority from his principal to make such warranty, or that such sales were usually attended with such a warranty. *Ibid.*

18. Where several subscribers in buying a stallion understood that the talks each had with the agent of the sellers were merely tentative, that the transaction was only to be consummated after the required number of subscribers had been obtained, and then only with a voluntary association of all subscribers then to be formed, a written warranty given at that meeting supersedes any oral promise of warranty made to individual subscribers. *Ibid.*

19. In an action for the price of a stallion, where no warranty is claimed as to the quality of the colts gotten by the horse, testimony that the colts gotten by him were defective is immaterial. *Ibid.*

20. In an action to recover the price of an engine upon a rescission because of a breach of warranty, the evidence, stated in the opinion, is *held* to support a verdict that the engine did not comply with the warranty. *Kohl v. Bradley, Clark & Co.* 301

21. In an action to recover the price of an engine upon a rescission because of a breach of warranty, the court submitted to the jury questions whether an expert, sent thirteen days after notice by the buyer of the defective condition of the engine, was sent within a reasonable time; whether the engine complied with the warranty; and whether within a reasonable time thereafter the defendant remedied the defects or offered to do so. *Held*, there being credible evidence to support findings in plaintiff's favor, that such findings should not be disturbed. *Ibid.*

Same: Notice of defects.

22. In an action to recover the price of an engine upon a rescission because of a breach of warranty, a notice to the seller specifying defects, stated in the opinion, is *held* to have been sufficient. *Kohl v. Bradley, Clark & Co.* 301

SALOONS. See INTOXICATING LIQUORS.

SCAFFOLDS. See DAMAGES, 9. MASTER AND SERVANT, 4, 11.

SCHEDULE of claims. See BANKRUPTCY, 7.

SECTION CORNERS. See BOUNDARIES, 2, 3.

SECTIONMEN. See RAILROADS, 14, 18, 19.

SERVANTS. See FALSE IMPRISONMENT. MASTER AND SERVANT. TRIAL, 18, 19.

SERVICE OF PROCESS. See PROCESS.

SETOFF AND COUNTERCLAIM.

See FRAUD, 4.

1. Defendants negotiated for the purchase of a part interest in a manufacturing plant, of which plaintiff and M. were each a one-fourth owner. Plaintiff made sale of one half of his one fourth through M. as his agent. Plaintiff and M. each took a separate note for the consideration. *Held*, under these circumstances, if defendants had a valid claim for partial failure of consideration, they could counterclaim for a proportionate amount of damages in a suit by plaintiff on his note, although M. was not a party to the suit. *Steckbauer v. Leykom*, 438

2. In such case, under the evidence, stated in the opinion, there was established a partial failure of consideration and a defense *pro tanto*, properly enforceable by way of counterclaim in an act on on the note, and the fact that misstatements, also stated in the opinion, were not made wilfully did not affect the defendants' rights. *Ibid.*

3. The statements in the inventory being in fact untrue, although the party making them at the time believed them to be true, were a legal wrong for which relief should be awarded, upon the ground that the party making them must be held to respond for the injury done in assuming to know and to represent as

facts things which did not actually exist, but upon which the other party relied to his damage in making the purchase. *Ibid.*

SETTLEMENT. See ACCORD AND SATISFACTION. COMPROMISE AND SETTLEMENT. CORPORATIONS, 4–6. EXECUTORS AND ADMINISTRATORS, 2, 5, 6. SALES, 11, 12.

SEVERANCE. See JOINT TENANCY, 6.

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STAY. See COSTS, 4, 8. JUDGMENTS, 3.

STOCK AND STOCKHOLDERS. See CORPORATIONS, 2-9, 11, 14, 23. FRAUD, 1-3.

STREET RAILWAYS.

Negligence: Injuries to travelers.

1. A motorman in charge of an electric car is required, in the exercise of ordinary care, to keep a proper lookout as to the tracks and streets upon which the car is operated to avoid collision with persons and vehicles on the street. *Glettler v. Sheboygan Light, Power & R. Co.* 137

2. In addition to the duty of a motorman in operating and managing the car and keeping a proper lookout along the track, he must observe the streets adjacent to the track sufficiently to enable him to ascertain whether persons are approaching or are about to approach the track, and, if such persons are in danger of being struck by the car, he must do all that an ordinarily careful and prudent motorman would do to avoid doing injury to such persons. *Ibid.*

3. The foregoing principles require a motorman, at a street crossing, to exercise greater care than between crossings, and much more care in case of very young children approaching the track unconscious of an approaching car, or being so circumstanced as to suggest a probability of such unconscious approach, than in case of adults. *Ibid.*

4. In an action for personal injuries received by a child four and one-half years old from being run over by an electric car, the evidence, stated in the opinion, is *held* to present a situation such that the motorman could have seen the plaintiff approaching the car at a distance sufficient to have enabled him, by the exercise of ordinary care, to have stopped the car before the collision. *Ibid.*

5. Such failure to observe plaintiff is *held* to sustain a finding that the motorman was negligent in not keeping a proper lookout for the child, from which flowed liability for the damage proximately resulting therefrom. *Ibid.*

6. If in the management of an electric car the motorman is required to perform the duties of conductor in addition to those of motorman, and an injury results which would not have occurred but for the performance of such additional duties, such management constitutes negligence. *Ibid.*

7. In an action for personal injuries received by a child four and one-half years old from being run over by an electric car, it appeared, among other things, that the motorman was performing the additional duties of conductor, and was engaged in looking after the payment of fares when, but for the performance of such additional duties, he could have observed the plaintiff attempting to cross the street. *Held*, that it was proper to submit to the jury the question of defendant's negligence in this respect. *Ibid.*

STREETS. See BOUNDARIES, 6. DEDICATION. MUNICIPAL CORPORATIONS. STREET RAILWAYS.

SUBSCRIPTIONS. See FRAUD.

SUBSTITUTED SERVICE. See PROCESS.

SUBSTITUTIONARY AGREEMENTS. See EVIDENCE, 10–12.

SUICIDE. See INSURANCE, 9, 11–15.

SURFACE WATER. See DEDICATION, 2.

SURPLUSAGE. See MASTER AND SERVANT, 7.

SURRENDER. See LIMITATION OF ACTIONS, 17. NAVIGABLE WATERS, 3.

SURVEYS. See BOUNDARIES.

SURVIVORSHIP. See JOINT TENANCY, 2, 4, 6.

TACKING. See LIMITATION OF ACTIONS, 8.

TAXATION. See EJECTMENT, 3. HIGHWAYS, 7–10. LIMITATION OF ACTIONS, 7. MUNICIPAL CORPORATIONS, 2–8. PARTIES, 1. TAX TITLES.

TAX CERTIFICATES. See TAX TITLES, 2, 3.

TAX TITLES.

See EJECTMENT, 3. LIMITATION OF ACTIONS, 7. MARRIED WOMEN.

Sales to prohibited officers.

1. A conveyance of a tax title by the county is not to be held void within the prohibitions of sec. 1143, Stats. 1898, because a deputy county treasurer was interested in making the sale, where the court on sufficient evidence has found that such officer was not interested in the purchase. *Maxcy v. Simonson,* 650

Actions: Conditions precedent to judgment.

2. In an action by the original owner to quiet title as against a tax-title claimant it is not error, under the provisions of sec. 1210*h*, Stats. 1898, to require the original owner to pay the face value of the tax certificates and interest from the time the tax-title claimant acquired them, or from the time he received conveyance from the county of the title acquired by the county under them. It is not the purpose of the statute to enable the original owner to escape paying a portion of his taxes by reason of the county having sold its tax certificates at less than their face value. *Maxcy v. Simonson,* 650

Same: Costs.

3. Under sec. 1210*h*, Stats. 1898, in an action to set aside a tax deed, the court adjudged that the tax deed was void, that the original owner be barred unless within the time allowed he pay into court, for the use of the tax-title claimant, the face of the tax certificate on which the deed was based and the face of all subsequent tax certificates, with interest, and upon such payment that the title to the lands in question be established in the original owner, and awarded a judgment for costs in favor of the tax-title claimant. *Held,* that the judgment for costs was premature and erroneous. *Maxcy v. Simonson,* 650

Possession: Limitation of actions.

4. In an action of trespass, under the facts, stated in the opinion, it was *held* that plaintiff's case came within the calls of sec. 1189*b*, Stats. 1898, and established her title. *Brunette v. Norber,* 632

5. In such case plaintiff was a "grantee" within the calls of sec. 1189*b*, Stats. 1898, although she was not named as such in the tax deed, but only as grantee in a warranty deed given her by the person to whom the tax deed was issued, the word "grantee," in sec. 1189*b*, being governed by the rule of construction contained in subd. 4, sec. 4971. *Ibid.*

TELEGRAMS. See TRIAL, 4, 5.

TELEPHONES.

1. Ch. 505, Laws of 1905 (sec. 1778, Stats. 1898, as amended), authorizes the construction and maintenance, upon certain terms and conditions, of telephone lines upon public highways, and sec. 1329*a* provides the distance above the highway at which all wires shall be strung. Plaintiff was moving his threshing machine drawn by a traction engine along the highway when the grain elevator thereof came in contact with, and was injured by, a guy wire maintained by defendant telephone company which had sagged so that it was less than the required height above such track. There was evidence that plaintiff did not know that the guy wire would strike the elevator of the threshing machine, that he was guiding his engine and giving it attention in order to keep it in the traveled track and out of the ditch, that there was a strong wind blowing the smoke into his face, and that he did not see the wire. *Held:*
(1) Defendant was guilty of negligence.
(2) It could not be said as matter of law that plaintiff was guilty of contributory negligence. *Chant v. Clinton Telephone Co.* 533

2. In such case it could not be said that the damages were caused by the engine being used in drawing the threshing machine, nor that the engine contributed to the injury complained of, and hence sec. 1347*b*, Stats. 1898, had no application to the case presented. *Ibid.*

TENANCY.
By the entireties. See JOINT TENANCY, 6–8.
In common. See JOINT TENANCY, 3.
Joint. See JOINT TENANCY.

TENDER. See PAYMENT, 1.

TERMS OF COURT. See VENUE.

TOOLS. See MASTER AND SERVANT, 5–10.

TOWNS. See HIGHWAYS, 5, 6. PAUPERS, 3.

TRACTION ENGINES. See TELEPHONES.

TRAP. See LARCENY.

TRESPASS.

See BOUNDARIES, 3. TAX TITLES, 4.

In an action for trespass in cutting and carrying away ice, alleged to be the property of plaintiff, the evidence, stated in the opinion, is *held* to support findings that the trespass was committed before the commencement of the action *Thompson v. Fuhrmann,* 375

TRIAL.

Preliminary proceedings. See VENUE.

Course and conduct of trial in general. See APPEAL, 22. TRIAL, 7.

Argument and conduct of counsel. See TRIAL, 6.

1. Remarks of counsel in argument as to the probable force of the evidentiary facts and the claim predicated thereon by opposite counsel, if prejudicial, were *held* cured by an admonition of the court that it was the province of the jury to determine the weight of the evidence. *Glettler v. Sheboygan Light, Power & R. Co.* 137

2. Where the court had instructed the jury that remarks of counsel, to which exception was taken, must be disregarded in their determination of the questions submitted, it is *held* that no prejudicial effect could have resulted from such remarks of counsel. *Parker v. Fairbanks-Morse Mfg. Co.* 525

Reception of evidence. See ANIMALS, 4. APPEAL, 17, 19. COMPROMISE AND SETTLEMENT, 1–3. CONSTITUTIONAL LAW, 4. CRIMINAL LAW, 2. EVIDENCE. INSURANCE, 2. HIGHWAYS, 11, 12. MECHANICS' LIENS. PATENTS, 4. PLEADING, 5, 9. WITNESSES.

3. In an action to recover the price of an engine upon a rescission because of breach of warranty, it is not error to admit in evidence the order for the purchase of the engine, where the correspondence, as well as the delivery of the engine upon such order, showed an acceptance of the order. *Kohl v. Bradley, Clark & Co.* 301

4. In an action to recover the price of an engine on a rescission for breach of warranty it is not error to admit plaintiff's telegram, sent after the engine had failed to comply with the warranty and after failure to send an expert to remedy the defects. *Ibid.*

5. It is not error to admit in evidence a copy of a telegram without previous notice to produce the original, where counsel for the objecting party states that his client did not have the original and never received such telegram. *Ibid.*

6 Where, in an action for injuries to a servant, the plaintiff was placed on the stand as an adverse witness and produced a written agreement with his attorneys, which contained nothing of a champertous nature, and twice denied that he had any agreement except the written one, the court was *held* justified in excluding any further examination of plaintiff on that subject. *Odegard v. North Wis. L. Co.* 659

Taking case from jury: Direction of verdict. See APPEAL, 20. COMPROMISE AND SETTLEMENT, 6, 7. HIGHWAYS, 13–15, 17, 18. INSURANCE, 9, 16. MALICIOUS PROSECUTION, 1, 2. MASTER AND SERVANT, 2–5. PAUPERS, 6. RAILROADS, 6, 8. STREET RAILWAYS, 7.

Instructions to jury: Province of court and jury. See ANIMALS, 2. APPEAL, 4. BOUNDARIES, 3. FALSE IMPRISONMENT, 2. INSURANCE, 12. MASTER AND SERVANT, 1–3, 10. MUNICIPAL CORPORATIONS, 10. RAILROADS, 7, 8. ROBBERY, 5, 6.

7. A trial court has full authority, in the exercise of sound discretion, to offer aid to the jury by way of further instruction or explanation, and may, without impropriety, make inquiries of them as to whether they are likely to agree. Hence it is not error for the court, after the jury had been deliberating for

some time, to recall them and ask them if they could be aided in their deliberations either by further instructions or by reading any of the evidence, or the trial judge, before leaving the courthouse for supper, to direct the officer in charge to inquire whether the jury were likely to agree within the next twenty minutes, to which they responded in the negative. *Hardt v. Chicago, M. & St. P. R. Co.* 512

Same: Right to present instructions.

8. The right to present instructions applicable to the case and have them given to the jury if they state the law correctly is an ancient right, recognized and guaranteed by sec. 2853, Stats. 1898, subject to the limitation that they must be in writing. *Odegard v. North Wis. L. Co.* 659

9. A rule of court which substantially impairs the right to present instructions, recognized and guaranteed by sec. 2853, Stats. 1898, is unreasonable, and hence void. *Ibid.*

Same: Necessity.

10. Where the instructions given to the jury on a branch of the case were sufficient and properly covered the case as presented by the evidence, it is not error to fail to instruct the jury on a matter concerning which no special instruction was requested. *Glettler v. Sheboygan Light, Power & R. Co.* 137

Same: Sufficiency.

11. Instructions to the jury, mentioned in the opinion, are *held* to have clearly informed them of the meaning of proximate cause, and not to have invaded the province of the jury. *Glettler v. Sheboygan Light, Power & R. Co.* 137

12. No error can be predicated on the language used by the court in the charge to the jury, where an examination of the charge shows that the language is hardly capable of the meaning ascribed, and in other parts of the charge the jury were fully and properly instructed on the subject. *Kohl v. Bradley*, Clark & Co. 301

13. Instructions to the jury which assumed that there was evidence upon which the jury might find the facts in accordance with plaintiff's testimony are *held* not erroneous, where the appellate court also finds that the jury might have done so. *Hardt v. Chicago, M. & St. P. R. Co.* 512

14. It is not error to instruct the jury that the burden of proof is upon the defendant to establish contributory negligence. *Ibid.*

15. No error can be predicated merely upon the refusal to give requested instructions where the request was an oral one and the party did not even undertake to formulate the instruction desired. *Ibid.*

16. Where the court instructed the jury as to each question of a special verdict where an affirmative answer would be favorable to the plaintiff, that, in order to give such affirmative answer, they must be satisfied by a preponderance of the evidence, it is *held* that the instruction carried to the jury the idea that they could not decide against the defendant without being so satisfied, and to fairly cover a requested instruction that the burden of proof rested on the plaintiff. *Ibid.*

17. The use of the word "fair" in a phrase of the instructions to the jury: "The burden of proof is upon the plaintiff to satisfy

you by a fair preponderance of the evidence," in connection with a direction that the jury must be satisfied of the existence of the fact referred to, is not misleading and therefore not prejudicial. *Parker v. Fairbanks-Morse Mfg. Co.* 525

18. In an action for injuries to a servant alleged to have been caused by the defective operation of a machine and also, in part, by the negligence of an incompetent engineer, requests for instructions, stated in the opinion, as to the rules by which the jury were to determine the question of the competence of the engineer and the question of the plaintiff's contributory negligence, and as to the burden of proof, are *held* to state correct legal principles applicable to the case and not covered by the general charge. *Odegard v. North Wis. L. Co.* 659

19. In an action by a servant for injuries the court instructed the jury that proximate cause was the immediate, direct, actual, natural, efficient, and real cause. *Held* inaccurate, but not prejudicial to defendant, since it placed a heavier burden on the plaintiff than the correct rule. *Ibid.*

20. In such case the inaccuracy was not prejudicial, since the jury, in answer to specific questions of the special verdict, had found all the elements of fact constituting proximate cause. *Ibid.*

Same: Requests for instructions. See CRIMINAL LAW, 3. TRIAL, 10, 15, 16.

21. In an action to recover the price of an engine upon a rescission because of breach of warranty, it is not error to refuse to instruct the jury "that the defendant was not bound to teach the plaintiff how to start or operate the engine," there being no evidence in the case to which the instruction was applicable. *Kohl v. Bradley, Clark & Co.* 301

22. A requested instruction that the jury could not find an engineer incompetent from the fact that he might have been guilty of one *or more* isolated acts of negligence is *held* too broad a statement. Proof of a single act of negligence is not sufficient to raise an inference of incompetence, while proof of many such acts may. *Odegard v. North Wis. L. Co.* 659

23. Where a special verdict is taken it is not error to refuse to give a requested instruction containing a substantially correct statement of the law, but which is general and does not apply to any question of the special verdict. *Ibid.*

Conduct of jury. See APPEAL, 12.

Verdict: General verdict. See ANIMALS, 1, 3. APPEAL, 9–13. BOUNDARIES, 2. EXECUTORS AND ADMINISTRATORS, 16. INSURANCE, 11.

Same: Special verdict. See APPEAL, 24. MASTER AND SERVANT, 6, 7. MUNICIPAL CORPORATIONS, 10. RAILROADS, 7, 8. TRIAL, 20.

24. On the facts, stated in the opinion, it is *held* that it was proper for the court, as part of a special verdict, to take the jury's finding as to a specific fact, although such finding was involved in the issue covered by another question of the special verdict. *Curkeet v. Steinhoff,* 146

25. It is not error to refuse to submit with a general verdict special questions where there was no request for a special verdict. *Kohl v. Bradley, Clark & Co.* 301

26. An inquiry in a question of a special verdict as to whether defendant "knew or ought to have known" presents an inquiry as to two separate facts. *Odegard v. North Wis. L. Co.* 659

[27. Whether questions of a special verdict inquiring whether defendant knew or ought to have known certain facts are defective for duplicity, not decided.] *Ibid.*

28. In submitting a question of a special verdict the court inquired whether a majority of the millowners under the same circumstances should have reasonably foreseen that an engineer's incompetence would be likely to cause an injury to *plaintiff*. *Held*, that the question was inaccurate, since it was only necessary to inquire whether the engineer's incompetence would be likely to cause injury to *another*. *Ibid.*

Same: Setting aside verdict. See INSURANCE, 11. SALES, 4.

Trial by court: Findings. See APPEAL, 8, 14–16, 25, 26. BANKRUPTCY, 5. FRAUDULENT CONVEYANCES. JUDGMENTS, 1. MECHANICS' LIENS.

29. Findings of fact and conclusions of law should be signed by the trial judge. *Sackett v. Price County*, 637

[30. Whether a judgment should be set aside solely because the findings were not signed, in a case where it appeared without dispute that they had been made and filed by the judge and through inadvertence had not been signed, not decided.] *Ibid.*

31. Findings are required to cover and settle controverted questions of fact, but where a fact is established by proper stipulation between the parties, or by admissions of the pleadings, a finding on the same fact is not necessary. *Catlin & Powell Co. v. Schuppert*, 642

Same: Sufficiency.

32. A record containing what is therein called "findings of fact," which are at most mere conclusions that the plaintiff cannot recover, and hence that defendants are entitled to costs, does not show compliance with sec. 2863, Stats. 1898, and such failure to determine the issues litigated justifies a reversal and new trial, unless it can be said that the judgment is supported by a preponderance of the evidence. *Fogo v. Boyle*, 154

Waiver and correction of irregularities and errors. See APPEAL, 21. COSTS, 3.

TRUSTS AND TRUSTEES.

Who are trustees. See EXECUTORS AND ADMINISTRATORS, 4. PARTNERSHIP, 1, 2. RELIGIOUS SOCIETIES, 2–5, 7, 9.

1. In the broad sense of the word a trustee is one in whom some estate, interest, or power in or affecting property is vested for the benefit of another. In this sense the term includes executors, administrators, guardians, receivers, trustees in bankruptcy, factors, bailees and agents, and all persons vested with the title or control of property and charged with fiduciary duties in relation thereto for the benefit of another. *McKeigue v. Chicago & N. W. R. Co.* 543

2. Beneficiaries of trust property, who are *sui juris* and whose rights are vested, may deal with and convey their equitable interests in the trust property, and the trustee will be required to convey the legal estate in accordance therewith if such action be not contrary to the terms of the trust. *Ibid.*

3. On the administration of an intestate estate the beneficiaries of the trust are the creditors of the estate and the heirs at law,

and when all creditors have been paid the heirs are the sole beneficiaries. *Ibid.*

Resulting trusts.

4. In an action to charge defendants as trustees holding the legal title to certain real estate for the plaintiff partnership, it was *held* that the transaction between plaintiff and C. (one of defendants) did not create an express trust within the calls of sec. 2081, Stats. 1898, but a resulting trust within the calls of sec. 2076. *Kyle v. Carpenter,* 310

UNDERTAKINGS. See APPEAL, 27.

UNDUE INFLUENCE. See DEEDS.

UNIONS. See ASSAULT AND BATTERY.

VACATION OF JUDGMENTS. See JUDGMENTS, 1-3.

VALUABLE CONSIDERATION. See VENDOR AND PURCHASER, 2.

VARIANCE. See PLEADING, 9. ROBBERY, 2, 4.

VENDOR AND PURCHASER OF LAND.

Construction of contract: Purchase or option?

1. Under a contract on which plaintiff founded its action, stated in the opinion, it was *held:*

   (1) The instrument was not an option to purchase, but an express sale and transfer of the plaintiff's right, title, and interest in certain options to defendant, an assumption by defendant of liabilities thereunder, and an express promise by him to pay the stipulated price per acre on or before nineteen months, with a promise on the part of plaintiff to deed the lands to defendant.

   (2) A provision that the contract was to be in force for nineteen months was not repugnant to or inconsistent with the express agreement to pay.

   (3) The covenants in the contract were mutual.

   (4) It was immaterial whether options thereby transferred gave the right to possession or not, since the options secured to plaintiff the right to acquire the ownership of the lands thereby covered and transfer the title to the defendant. *Baraboo Land, Mining & Leasing Co. v. Winter,* 457

2. In such case the recital of a "valuable consideration" did not necessarily mean that the parties stipulated for a consideration separate and outside of the alleged purchase price of the lands, since a nominal consideration would satisfy the formal recital of consideration usually inserted in contracts. *Ibid.*

3. The fact that plaintiff would make a large profit was not significant, since it could not be inferred, for the purpose of construing a contract to purchase into an option, that the stipulated price was unreasonable. *Ibid.*

Transfer by operation of law: When takes effect.

4. In a transfer of realty by operation of law the transition occurs when the last act requisite thereto takes place regardless of the date of the agreement, if there be one, to which all acts in that regard are referable. *Evans v. Crawford County Farmers' Mut. F. Ins. Co.* 189

5. In case of a transfer of realty pursuant to a prior agreement the rights of the parties as to strangers, in the absence of any

agreement to the contrary between such parties, are referable to the actual transition of the property. *Ibid.*

6. In case of an agreement to transfer land on which there is a building, the owner being insured against loss thereof by fire and a destruction of such building after such agreement and subsequently a consummation of such agreement as to what remains, in the absence of any contract to the contrary, as regards the insurer, the right to recover for the loss is in the executory vendor. *Ibid.*

7. The doctrine of relation operates to carry a transfer of realty back to the agreement to which it is referable so far as necessary to protect the equitable rights of the vendee, but strangers to the transaction cannot claim any benefit thereof. *Ibid.*

VENUE.

Under the facts stated in the opinion, and under sec. 2625, Stats. 1898, as amended by ch. 101, Laws of 1901, and ch. 282, Laws of 1905, *held:*

(1) The purpose of the statute is to secure to the party making the required affidavit not only an unprejudiced trial, but a trial in the home circuit, provided a competent judge seasonably attends, and at the same time to secure both parties against a long delay.

(2) The statute contemplates that there shall always be one term at which the cause can be tried in the home circuit, and that such term shall be a term at which the cause is in a situation to be moved peremptorily for trial.

(3) The cause can be sent from the circuit only after the lapse of a term at which it could be tried.

(4) The presiding judge calls in another judge for the purpose of *exercising jurisdiction*, and not alone for the purpose of trying the cause.

(5) When the "other judge" held court and heard and passed upon the motions, he did "so attend" within the meaning of the statute, and hence, under the provision "if no judge shall so attend," it was not error to refuse to change the place of trial on the last day of the November term.

(6) The action was properly triable in S. county at the June term at which it was tried. *Odegard v. North Wis. L. Co.* 659

VERDICT. See ANIMALS, 1, 3. APPEAL, 9–13, 20. BOUNDARIES, 2. EXECUTORS AND ADMINISTRATORS, 16. INSURANCE, 11. MASTER AND SERVANT, 5. SALES, 4. TRIAL, 24–28.

WAIVER. See COSTS, 3. INTOXICATING LIQUORS, 6. PROCESS. SALES, 7–9.

WARRANTY. See DAMAGES, 1–3. INSURANCE, 2, 3. SALES, 1, 5–7, 11–21. TRIAL, 3, 4, 21.

WATERS AND WATERCOURSES.

Natural watercourses. See INJUNCTION. NAVIGABLE WATERS.

Mill ponds: Obstructions.

In an action to compel the removal of an obstruction placed in a mill pond, the complaint alleged facts sufficient, if true, to entitle plaintiff to an injunction perpetually forbidding defendant from erecting or maintaining, within the flowage created

by the dam, obstructions of any kind or description, and the evidence, stated in the opinion, is *held* sufficient to sustain findings in favor of plaintiff. *Sebranke v. Kohlmeyer,* 352

Ice. See BOUNDARIES, 3. TRESPASS.

WEAPONS. See ASSAULT. ROBBERY, 2–6.

WILLS.

See JOINT TENANCY, 4, 8.

Probate: Appeal: Jurisdiction.

1. On appeal to the circuit court by an heir and legatee from an order of the county court admitting a will to probate, it is error for the circuit court to rule that appellant, who was present in the county court at the time the will was admitted to probate and made no objection thereto, is estopped from contesting such probate in the circuit court by reason of his consent given in the county court. *Bovee v. Johnson,* 447

2. Under secs. 2294, 4031, 4034, Stats. 1898, an heir named as legatee in a will, who was present in the county court on its probate and made no objection, may appeal from the determination admitting such will to probate and file objections to such probate, and is thereupon entitled to a trial *de novo* in the circuit court. *Ibid.*

3. On an appeal from a judgment of the circuit court admitting, on appeal from a judgment of the county court, a will to probate, claims were made in the supreme court, for the first time, that the appeal papers from the county court were insufficient to give the circuit court jurisdiction. These claims were based on two grounds: (a) that it did not appear that appellant was in any wise interested in the estate; (b) that the notice of appeal was not signed by appellant nor by any person by his direction. *Held:*

(1) Recitation in the petition for the probate of the will that appellant was one of testator's next of kin and heirs at law, and in the will, by which he was named as a legatee, that he was a son of deceased, and a statement in the notice of appeal that appellant was aggrieved by the order of the county court, showed that appellant was interested in the estate.

(2) Appellant having given and signed the undertaking on such appeal as principal, and the same having been approved by the county court, the notice of appeal signed B., "attorney for appellant," sufficiently established that the notice of appeal was given by his direction.

(3) The circuit court had jurisdiction by virtue of the appeal. *Ibid.*

WITNESSES.

Production of documents. See DISCOVERY, 1, 2.

Examination. See DISCOVERY, 1, 2. EVIDENCE, 14–18. RAILROADS, 2–4.

1. In an action on a note for the price of a stallion, one of the plaintiffs testified that they owned the note, stated the amount due thereon, and that a bill of sale with warranties was given with the animal. Upon cross-examination he denied that he

had offered P. a share in the horse for nothing if he would allow the use of his name to influence others. After plaintiff had so answered, a general objection was made and overruled. P. having been put on the stand by defendants was asked what offer had been made him, which question was objected to as incompetent, irrelevant, and immaterial, whereupon counsel stated it was offered to impeach plaintiff, and on this ground the objection was overruled. There was no issue of fraud in the case. *Held:*

(1) The question was irrelevant on plaintiff's cross-examination, since plaintiff had given no testimony which the alleged statement tended to contradict.

(2) The objection not being interposed until after the question was answered, and there being no motion to strike out the answer, plaintiffs, on appeal, could not take advantage of the fact that the question was answered.

(3) On P.'s direct examination the objection should have been sustained. The question asked of plaintiff did not relate to a relevant fact, and hence his answer could not be contradicted even for the purpose of impeachment. *Dunham v. Salmon,* 164

2. It is not prejudicial error to permit a witness to answer a question as to his authority as agent where, though the answer was a conclusion, the evidence without the answer showed that the witness was such agent. *Kohl v. Bradley, Clark & Co.* 301

3. Plaintiff is not bound by the answer of the agent of the adverse party simply because called as a witness for the plaintiff. *Ibid.*

Same: Parties. See TRIAL, 6.

Same: Cross-examination. See WITNESSES, 1.

4. It is not error to refuse cross-examination of a witness where he is afterwards permitted to testify fully upon the subject. *Kohl v. Bradley, Clark & Co.* 301

Credibility: Impeachment. See INSURANCE, 13. RAILROADS, 11. ROBBERY, 5. WITNESSES, 1.

WORDS AND PHRASES.

Acquire, hold, or dispose of property in this state, in statute. See CORPORATIONS, 23, 24.

Affecting the personal liability thereof, in statute. See CORPORATIONS, 25, 26.

All the evidence, in certificate to bill of exceptions. See APPEAL, 6.

All the timber, in deed. See LOGS AND TIMBER, 2.

Any person, in statute. See NE EXEAT, 4.

Assessment roll, in statute. See HIGHWAYS, 7.

Beneficiaries. See TRUSTS AND TRUSTEES, 3.

Cease to be operated, in insurance policy. See INSURANCE, 3.

Certificates of stock. See CORPORATIONS, 1.

Competent petitioner. See HIGHWAYS, 9.

Dangerous weapon. See ASSAULT, 1, 2.

Due course. See BILLS AND NOTES, 5, 6, 8, 9.

Fair, in instructions to jury. See TRIAL, 17.

Grantee, in statute. See TAX TITLES, 5.

Holder in due course. See BILLS AND NOTES, 5, 6, 8, 9.

Joint tenancy. See JOINT TENANCY, 1.

Made pursuant to law, in statute. See INTOXICATING LIQUORS, 4.

Mutual insurance companies. See INSURANCE, 1.

On such appeal, in statute. See *Breed v. Weed,* 264.

Operation of railroads. See RAILROADS, 17.
Order, in statute. See INTOXICATING LIQUORS, 3, 4.
Petitioned, in statute. See HIGHWAYS, 10.
Risk or hazard peculiar to the operation of railroads. See RAILROADS, 15–17, 19.
So attend, in statute. See VENUE.
Special proceeding. See DISCOVERY, 1.
Stranger. See JUDGMENTS, 6.
Sufficient grounds, in statute. See NE EXEAT, 4.
Supported as a pauper, in statute. See PAUPERS, 1, 2, 4–6.
Timber. See LOGS AND TIMBER, 1.
Trustee. See TRUSTS AND TRUSTEES, 1.
Valuable consideration, in contract. See VENDOR AND PURCHASER, 2.
Want of skill, in instruction to jury. See MASTER AND SERVANT, 7.

Ex. J.M.
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